SUPREME COURT, U. S.

FILED

JUN 4 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1972

No. 72 - 1622

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,

Petitioners,

v.

SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners Alma F. Anderson et al., plaintiffs and appellees in the courts below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit herein.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah is reported at 348 F. Supp. 1170

and set forth at page 1a of the Appendix hereto. The opinion of the court of appeals is reported at 475 F.2d 29, and is set forth at page 37a of the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered March 16, 1973. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). The time for filing this petition expires June 14, 1973.

QUESTIONS PRESENTED

1. Whether the "establishment clause" is violated by dedication of public property in aid of a private society's project to erect monuments to biblical ideas throughout the United States, for the avowed purpose of inspiring a "renewed respect for the laws of God."

2. Whether this court's "wall of separation between Church and State" may be breached by a subjective determination that there is some secular purpose and effect to be found in admittedly religious writings.

3. Whether the court of appeals improperly overruled the district court's factual determination that the purpose and primary effect of erection of the monolith on public property were to advance some religious ideas and inhibit others.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The pertinent provisions of the Constitution and Rule 52(a), Federal Rules of Civil Procedure, are as follows:

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 52, Federal Rules of Civil Procedure, Findings by the Court:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

STATEMENT

This is an action to enjoin a city and county from maintaining on their joint property a permanent stone monolith on which the Ten Commandments and Christian and Hebrew religious symbols are engraved. The district court's jurisdiction was based on 28 U.S.C. §1331.

The Fraternal Order of Eagles, a private society, erected the monolith as part of its "youth guidance program," the purposes of which include the inspiration of "all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life." The particular version of the Ten Commandments was chosen after collaboration with members of the clergy of "all denominations." The Eagles propose to erect similar monoliths each year throughout the United States. Nine already have been placed in Utah.

In addition to the Ten Commandments, the monolith includes an All-Seeing Eye of God, "one of the oldest religious symbols", Stars of David to "recognize our Jewish brethren" and Chi-Rho, the Greek first letters of Christ's name, "in a position denoting the acceptance of these ancient laws of God."

The monolith was placed on public property, and maintained and lighted at public expense, near the front entrance of the courts building in Salt Lake City. Persons attending the state trial courts in Salt Lake County, or the Salt Lake City courts, ordinarily must pass in front of it to enter or leave the courts building.

The Salt Lake City monolith was not erected and maintained as part of any city or county program, pageant, or historical display. It is the only such display on the grounds of the courts building. Neither the city nor the county has any general program permitting the erection of monuments on public properties, and whether such a monument is erected or not depends entirely upon the personal views of the officials.

The district court held that the purpose and primary effect of the monolith was to advance or inhibit particular religious ideas, enjoined the continued maintenance of

the monolith on public property, and ordered the city and county not to permit erection or maintenance of other religious monuments on public property.

The court of appeals in reversing the judgment of the district court did not discuss the meaning and effect of Rule 52(a), Federal Rules of Civil Procedure, and did not hold that the district court's findings of fact were "clearly erroneous." The court of appeals acknowledged that the Ten Commandments had religious significance, but reversed the judgment on a subjective appraisal that neither the purpose nor a primary effect of erection and maintenance of the monolith was to advance or inhibit religious ideas.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO PREVENT EMASCULATION OF PRIOR RULINGS OF THIS COURT CONCERNING STATE ACTION THE PURPOSE OF WHICH IS RELIGIOUS

This court's decisions construing the establishment clause represent a consistent and unyielding line of authority implementing Madison's opposition to "every form and degree of official relation between religion and civil authority,"[1] and his admonition that "not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose."[2] The court of appeals decision portends a new rubric—one in which state support of or relation to religion in some degree may be sanctioned if any reasonable amount of secular purpose can be found

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1 Everson v. Board of Education, 330 U.S.1 (1947)
2 Id. 40.

in association with an admittedly religious document. That effect in this case is apparent when it is considered that, unlike prior situations in which religious displays have been held permissible in connection with public pageants or rituals having a secular purpose (such as convening a court, decorating a coin, or observing a holiday), here there was no occasion for the display other than a desire to expose the public to ideas expressed in a religious writing.

In *Everson* even the dissenters agreed with Justice Black's opinion for the majority that the establishment clause

> " . . . governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.'
>
> * * *
>
> "The amendment was not duplicitous. 'Religion' and 'establishment' were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree." *Everson v. Board of Education*, 330 U.S. 1, 39 (1947)

and;

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization and *vice versa*." *Id.* at 53-54.

And the court has been consistent to this date:

> " . . . the establishment clause has been considered by this Court eight times in the past score of years [and numerous times since] and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power re-

> specting religious belief or the expression thereof." *School District of Abington Township v. Schempp,* 374 U.S. 203, 222 (1963).

The court of appeals was aware of these pronouncements. Indeed, it cited and approved them, but simply refused to give them effect. It bowdlerized the test stated by Justice Clark in *School District of Abington Township v. Schempp,* 374 U.S. 203, 222 (1963):

> "What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution"[3]

when it saw its duty as being to "strike a balance between that which is primarily religious and that which is primarily secular, albeit embodying some religious impact" (App. 41a), and that although "a large portion of our population believes [the Ten Commandments] are Bible based * * * it also has substantial secular attributes" (App. 43a). Thus, the court of appeals simply emasculated this court's counterpoint to the "purpose" and "primary effect" standards of the test: "if *either* [purpose or effect] is the enhancement or inhibition of religion" the enactment must fall. This court's long unbroken line of precedent is thereby stood on its head, for if this opinion stands, so too will stand all enactments if any purpose is somewhat secular.

The court of appeals acknowledged that "one of the declared purposes of the monolith was to inspire respect for the law of God." (App. 37a). This court has never before sanctioned a religious display whose "purpose" is religious. The case is plainly distinguishable from one in which religious documents or symbols are displayed for

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3 Accord, **Lemon v. Kurtzman,** 403 U.S. 602 (1971)

a plainly secular "purpose," but have some minimal sectarian "effect."

II

THE WRIT SHOULD BE GRANTED TO PREVENT STATE ENACTMENTS DESIGNED TO BENEFIT ALL OR SUBSTANTIALLY ALL RELIGIONS

The Eagles must have assumed that a monolith of broad religious significance among Christians and Jews would be inoffensive to the establishment clause. Therefore, as the trial judge found, "several years were spent in research and collaboration with members of the clergy of all denominations" (App. 4a), and the emblems on the monolith were designed to make it acceptable to the nation's religious majorities.

The court of appeals implicity took these facts as mitigating the religious impact of the monument with its observation "that the Order of Eagles is not a religious organization — it is a fraternal order *which advocates ecclesiastical law as a temporal foundation on which all law is based* * * * (App. 44a), failing to recognize that "ecclesiastical law" is itself a religious concept. The court of appeals also took pains to observe that "we are a religious people," which, though probably true of most Americans, is no justification for the public support of the religious precepts of the majority.

The monolith proclaims its religious purpose:

> "I AM the LORD thy God
> Thou shalt have no other Gods before me"

Yet this court has declared that

> "Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947)

This court should grant certiorari to reaffirm that concept, and dispel the notion that the religious purpose of an enactment may be avoided by broadening its appeal, or that the establishment clause is not concerned with promoting all religion as well as some specific religion. This case, originating in a state in which one religion is dominant, is a particularly appropriate vehicle for such a declaration, inasmuch as state pronouncements respecting that religion necessarily would have a broad appeal.

Within our society are some having religions not recognizing the "God" of the Western religions to which the monolith refers,—and, indeed, some recognizing no gods at all. They are entitled to the protection of the establishment clause, whatever their numbers, and Madison's and Jefferson's compelling reasons for maintaining the wall between church and state should not be abandoned simply because the religious appeal is broad.

III

THE WRIT SHOULD BE GRANTED TO SUPPLY GUIDANCE AND RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER "PURPOSE" AND "EFFECT" ARE QUESTIONS OF FACT OR LAW

A test prescribed by *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963), recognized by this court since that decision, is whether the purpose or primary effect of state action is the advancement or inhibition of religion.

The Court of Appeals for the District of Columbia Circuit has recognized the factual character of the dual question. In *Allen v. Hickel*, 424 F.2d 944 (D.C. Cir. 1970) the court carefully examined facts supporting summary judgment and dismissal of a suit challenging display of a creche in a federal park. It held that the undisputed facts showed a secular purpose, but remanded the case for trial as to the secular or religious effect of the display.

In the present case the effect of the decision was to set aside findings of fact of the district court, even though such findings were supported by substantial evidence and were not—and were not held to be—"clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure. Thus, in conflict with the Court of Appeals for the District of Columbia, the Court of Appeals herein has converted the factual injuiry mandated by this Court in *Schempp* to a legal determination which may be rendered sans record or evidence. The consequences are frightening, for virtually any attempted establishment of religion may be justified according to the subjective whim of the court.

In the district court, consistent with this court's *Schempp* decision, all parties tried the case with the understanding that the questions of "purpose" and "primary effect" were factual matters to be determined by the court on the basis of evidence presented to it. The court heard evidence and found a violation of the "establishment

clause." This court should declare that such findings are not to be lightly cast aside.

CONCLUSION

For the foregoing reasons, Alma F. Anderson et al., your petitioners, respectfully pray that their petition for a writ of certiorari be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

[Caption Omitted]

RITTER, Chief Judge.

By action of the Boards of Commissioners of both Salt Lake City and Salt Lake County, a "Ten Commandments" monument was erected on publicly owned land—the court-house grounds close to the front entrance of the "Hall of Justice," where the business of the City and County Courts is conducted, and where all citizens having business with those courts must go to seek justice.

The Eagles, a private fraternal organization, donated the stone monument and paid the expense of erecting it.

The court-house lawns on which it stands are owned by, and maintained at the expense of, the taxpayers. The monument is maintained and repaired, when damaged by vandalism, at the expense of the taxpayers.

And at taxpayers' expense, the defendants installed a light to illuminate the monument so that the inscription can be read at nighttime. And defendants maintain and repair the light at taxpayers' expense.

A stone bench, erected at taxpayers' expense, is located on the public walkway leading to the court-house door. The bench faces the monument which is set two feet from the walkway, so that passersby may sit, and read, and contemplate the message on the graven granite.

The members of both the Salt Lake City and Salt Lake County Commissions were persuaded by the Eagles to authorize the placing of the monument on the front lawn of the Courts Building in full view of the persons entering and leaving the building.

The stone is granite, five feet by three feet, set in cement for permanence, and is of the cleft tombstone shape of common depictions of the tablets bearing the biblical ten commandments.

It is inscribed as follows:

"the TEN COMMANDMENTS

I AM the LORD thy God.
Thou shalt have no other gods before me.
Thou shalt not make to thyself any graven images.
Thou shalt not take the Name of the Lord thy God in vain.
Remember the Sabbath day to keep it holy.
Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
Thou shalt not kill.
Thou shalt not commit adultery.
Thou shalt not steal.
Thou shalt not bear false witness against thy neighbor.
Thou shalt not covet thy neighbor's house.
Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's."

At the top of the stone, on two tablets in the cleft tombstone shape, is a meaningless jumble of letters in what appears to be an eastern script, to give the illusion of authentic antiquity.

The stone is also engraved with symbols: located between the two tablets at the top of the monument is a triangle with an eye in it - the "All Seeing Eye of God" - a common symbol, in Christian religions, which represents the Holy Trinity - the godhead; below the inscription of the commandments, at each corner is a replica of the Star of David, which is a well known Jewish symbol, taking its origin from King David—Christ was of the House of David. And at the very bottom in the center between the two Stars of David is a figure, Christ's monogram, the letter X superimposed upon the letter P, known in the Christian religion as a Chi Rho - the first two Greek letters of His name. The monogram is placed at th bottom of the tablet in a position which suggests that it was intended to show Christ's signature to the complete context, (which, indeed, the Eagles say was their purpose, lines 21-23, page 4, infra).

This "Ten Commandments" monument was erected pursuant to what the Lodge calls its "youth guidance program" a long established and continuing program under which these monuments have been placed on public properties across the United States and Canada. The program has been in effect in the State of Utah for about ten years during which nine monuments have been placed in various cities in Utah.

The purposes of the Eagles with regard to that program have been officially set forth in a document produced by the Eagles organization and introduced as evidence by the defendants in this case. That document is entitled, "Suggested Program for Ten Command-

ments Monolith Dedication," and is quoted here in pertinent part:

> "PRELIMINARY ARRANGEMENTS:
> (Important)
> "Contact a prominent member of the Protestant Clergy, Catholic Priest or Bishop and a Jewish Rabbi. Present each one with a copy of the synopsis explaining the Eagles' Ten Commandments program, including the various endorsements of the clergy and other authorities. Explain to them the selection of the translation appearing on the monolith as well as the symbols appearing thereon:
>
> "We, of the Fraternal Order of Eagles, in searching for a youth guidance program recognized that there can be no better, no more defined program of Youth Guidance, and adult guidance as well, than the laws handed down by God Himself to Moses more than 3000 years ago, which laws have stood unchanged through the years. They are a fundamental part of our lives, the basis of all our laws for living, the foundation of our relationship with our Creator, with our families and with our fellow men. All the concepts we live by—freedom, democracy, justice, honor—are rooted in the Ten Commandments.
>
> "Several years were spent in research and in collaboration with members of the clergy of all denominations, with the result that a Ministerial Association composed of every Protestant church in the community, a Catholic Bishop and a Jewish Rabbi, concluded that a translation should be used not identified with any particular faith, but one containing essentially all the Commandments. They were also interested in brevity and a translation that could be easily memorized.
>
> "With the same care symbols were selected to denote such universal acceptance. The All Seeing Eye of God, is one of the oldest religious symbols,

used also by a number of lodges and fraternal organizations. The Stars of David recognize our Jewish brethren. Christ was of the House of David and his symbol appears as Chi-Rho, the first Greek letters of His name, in a position denoting the acceptance of these ancient laws of God. This symbol also has the appearance of the superimposed letters P.X., an abbreviation of Pax, meaning peace. The flying Eagle with the American flag is the emblem of our country, as well as the emblem of the Fraternal Order of Eagles.

"We concluded that granite similar in color and texture to that found in the heights of Mt. Sinai, would be more logical and more enduring, since the Commandments were written in fire on the granite of Mt. Sinai.

"The erection of these monoliths is to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life."

The plaintiffs, all residents, citizens and taxpayers of Salt Lake City and Salt Lake County charge in this suit that the erection and maintenance of this monument by action of the Boards of Commissioners of the City and County on public property violate the First and Fourteenth Amendments of the United States Constitution, and Article 1, sec. 4 of the Utah Constitution, particularly the Establishment of Religion clause.

They seek a mandatory injunction to compel the removal and to enjoin the erection of the monument.

The law that governs this case is the United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The First Amendment is the direct descendant of Virginia's Statute of Religious Liberty, of which Thomas Jefferson was the author:

"Well aware that almighty God hath created the mind free; * * * that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; * * *

"*We the General Assembly*, do enact, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall he be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief * * * ."

"A Bill for Establishing Religious Freedom", enacted by the General Assembly of Virginia, January 16, 1786. See 1 Randall, The Life of Thomas Jefferson (1858) 219-220; XII Hening's Statutes of Virginia (1823) 84."

The Virginia Statute of Religious Liberty is Document Number 80 in Documents of American History by Henry Steele Commager, 1968.

The Statute is preceded by Commager's excellent sketch of the climactic period of the Virginia struggle for religious liberty which covers the decade 1776-1786, from adoption of the Declaration of Rights to the enactment of the Statute of Religious Freedom:

"The Declaration of Rights of 1776 had announced the principal of religious liberty, but the

Anglican Church was still the established church. In 1777 the liberals succeeded in repealing the statutes requiring church attendance and universal support of the established church, but it was not until 1779 that the church was disestablished. Even this was not satisfactory, and Jefferson prepared a bill for absolute religious freedom and equality. This complete divorcement of church and state was bitterly opposed not only by the Episcopal but by the Presbyterian and other dissenting churches as well. The proposal to make all Christian churches state religions on equal standing and support them by taxation found favor with such men as Patrick Henry, Washington, and other conservatives. Jefferson characterized the long struggle for religious freedom as 'the severest contest in which I have ever been engaged,' and it was not until 1785 that his bill, sponsored in his absence by Mason, Madison, Taylor, George and W. C. Nicholas, passed the House: in January 1786 it was accepted by the Senate and became law. 'Thus', wrote Madison, 'in Virginia was extinguished forever the ambitious hope of making laws for the human mind', while Jefferson regarded it as one of his three memorable contributions to history. The Bill was translated into French and Italian, and aroused world-wide remark. See, H. J. Eckenrode, *Separation of Church and State in Virginia*; C. F. James, *Documentary History of the Struggle for Religious Liberty in Virginia*; R. B. Semple, *Rise and Progress of Baptists in Virginia*; F. W. Hirst, *Jefferson*, p. 130 ff.; G. Hunt, *Madison*; A. C. McLaughlin, et al., *Source Problems in United States History*, No. 14." *Documents of American History* by Henry Steele Commager 1968.

Madison wrote of Jefferson and the Virginia Statute of Religious Liberty: "This act," he wrote, " * * * was always held by Mr. Jefferson to be one

of his best efforts in the Cause of Liberty to which he was devoted. And it is certainly the strongest legal barrier that could be erected against the connection of church and state, so fatal to the liberty of both."

On a stone over Jefferson's grave at Monticello is chiseled the epitaph he himself composed. His instructions for the inscription on his gravestone were that he be known as:

> "AUTHOR OF THE DECLARATION OF INDEPENDENCE, OF THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM, AND FATHER OF THE UNIVERSITY OF VIRGINIA."

Here, in words "issuing from the tomb", Jefferson says "by these as testimonials that I have lived, I wish most to be remembered."

Thomas Jefferson, in 1802, wrote a committee of the Danbury (Connecticut) Baptist Association: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'Make no law respecting an establishment of religion, or prohibiting the free exercise thereof; thus building a wall of separation between Church and State.' "

By the use of his famous figure of speech: " * * * thus building a wall of separation between Church and State", Jefferson verifies and confirms the inner logic of the establishment clause itself which is absolute and uncomprising- "Congress *shall* make *no law* respecting an establishment of religion * * *."

In probably the most important case in the history of the "establishment clause" of the First Amendment,

Everson v. Board of Education, 330 U.S. 1, (1947), Justice Rutledge wrote a brilliant essay upon the historical background of the First Amendment. He wrote at pages 33-34, and on these principles all the Justices agreed:

"No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. * * ** In the documents of the times, particularly of Madison, who was the leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content."

Justice Jackson, also, wrote, in *Everson,* supra, 26-27:

"This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse * * *.

"This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They are all quick to invoke its protections; they are all irked when they feel its restraints. * * *

"But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all * * *."

Justice Rutledge, continuing his essay, in *Everson*, supra, 32-33, wrote:

" 'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

"No one would claim today that the Amendment is constricted, in 'prohibiting the free exercise' of religion, * * * It secures all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place, * * *.

"The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.

" 'Religion' has the same broad significance in the twin prohibition concerning 'an establishment'. The Amendment was not duplicitous. 'Religion' and 'establishment' were not used in any formal or technical sense. The prohibiton broadly forbids state support, financial

or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."

James Madison was the author of the First Amendment. His views concerning what is "an establishment of religion" are particularly significant. They are stated in his broadside—his historic *Memorial and Remonstrance Against Religious Assessments.* A copy is attached as an Appendix to this opinion together with a copy of the bill against which it was directed.

"As the *Remonstrance* discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority." - Rutledge, J., *Everson v. Board of Education,* 330 U.S. 1, 39 (1947).

"With Jefferson,Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever."—Rutledge, J., *Everson v. Board of Education,* supra, 40.

"In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose.—*Remonstrance,* Par. 3 * * *." Rutledge, J., *Everson v. Board of Education, Id.* p. 40. The third ground of remonstrance bears repetition here: 'Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealouy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. * * * The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled

the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that * * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? II Madison 183, 185-186."—Rutledge, J., *Everson v. Board or Education*, supra, 40-41.

"In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises." — Rutledge, J., *Everson v. Board of Education, Id.* 41, 67 S.Ct. 524.

"This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction. Id., Par. 9. Today as in his time 'the same authority which can force a citizen to contribute three pence only * * * for the support of any one [religious] establishment, may force him' to pay more; or 'to conform to any other establishment in all cases whatsoever.' And now, as then, 'either * * * we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." *Remonstrance*, Par. 15.

"The realm of religious training and belief remains, as the Amendment made it, the kingdom of the individual man and his God. It should be kept inviolately private, not 'entangled * * * in precedents' or confounded with what legislatures legitimately may take over into the public domain."—Rutledge, J., *Everson v. Board of Education*, 330 U.S. 1, 57-58.

Our constitutional policy "does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself." — Rutledge, J., *Everson v. Board of Education*, supra, 52.

"The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's *Remonstrance*, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when

it comes to rest upon that secular foundation it vanishes with the resting. Id., Par. 7, 8. Public money devoted to payment of religious costs, educational or other brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. Id., Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. Ibid. The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. Id., Par. 11." Rudledge, J., *Everson v. Board of Education*, supra, 53-54.

In a single paragraph the Court in *Everson* expressed the general principles evolved in the history of the religion clauses of the First Amendment. On these principles the justices were unanimous. The principles about public money spent for religious causes, and the principles about the use of public institutions to promote religious ideas, expressed in the *Everson* paragraph are decisive of the case at bar.

No elaboration of the point is necessary. The Court speaking through Justice Black, said, supra, 15-16:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

About public money spent for religious causes, the Court said, *inter alia*: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatsoever they may be called, or whatever form they may adopt to teach or practice religion."

About the use of public institutions to promote religious ideas, the Court said, *inter alia*: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."

Justice Black, in the majority opinion in *Everson* stated the general proposition that the Establishment Clause commands neutrality. He says the amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; * * *

State power is no more to be used so as to handicap religions, than it is to favor them." 330 U.S. 1, 18.

The neutrality doctrine has persisted. Justice Clark writing for the majority in *School District v. Schempp* and *Murray v. Curlett,* 374 U.S. 203 (1963) referred to a "wholesome neutrality", at page 222. He also says: " * * * the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Significantly, here again, the Court's statement of the Establishment Clause test is broad and uncompromising.

From *Everson* (1947) to the present the justices have formulated the Establishment Clause in absolute terms.

Justice Black in *Everson* had said: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach", supra, 18.

Justice Frankfurter endorsed strict disestablish-

ment stating that "separation means separation, not something less. Jefferson's metaphor in describing the relation between church and State speaks of a 'wall of separation', not a fine line easily overstepped." *McCollum v. Board of Education,* 333 U.S. 203, 231 (1948) (Frankfurter, J. concurring).

Justice Goldberg, in *School District v. Schempp,* 374 U.S. 203, at p. 305, states the hope that may be realized from neutrality: "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

"The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."

Justice Jackson, in *Everson*: "This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."

To paraphrase James Madison and Justice Rutledge, the case at bar "is not just a little case about bus fares", nor just a little case about a "three pence" exacted from the taxpayers for religion.

This case is about that "act of the whole American people", which Thomas Jefferson "contemplated with sovereign reverence", "building a wall of separation between church and state."

This case is about James Madison's question: "Who does not see that * * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

This case is about the purpose of the "religion clauses" of the First Amendment — "to promote and to assure the fullest possible scope of religious liberty and tolerance for all."

This case is about the purpose of the establishment and freedom of religion clauses, "not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."

This case is about the command of the First Amendment as construed by the Supreme Court, that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

This case is about the commands of the First Amendment, as construed by the Supreme Court, that "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the

Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

The defenses of abstention and lack of standing are without merit. Nothing in the abstention doctrine requires this court to abstain from deciding the Utah constitutional questions. The state provision is virtually identical to the Federal:

> "Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with state courts. No litigation is pending in the state courts in which the questions presented here could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess." *Meredith et al. v. City of Winter Haven*, 320 U.S. 228 at 236.

> "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167 at 183.

The defense of lack of standing likewise is without merit: Standing may be predicated upon non-economic

as well as economic interests, *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, and paramount among such non-economic interests conferring standing is a spiritual stake in Establishment Clause and Free Exercise Clause values. *Id.* at 154. See also, *Flast v. Cohen*, 392 U.S. 83 (1968); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1968). For purposes of standing under the Establishment Clause, plaintiffs need not show that their religious freedom has been infringed. *School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Thus, it is enough to show infringement of a personal stake in Establishment Clause values if plaintiffs claim, as these plaintiffs do, devotion of public land in which they have a beneficial interest to an establishment of religion. *Allen v. Hickel*, 424 F2d 944, 947 (1970).

In 1963 the Supreme Court said in *School District v. Schempp*: "As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years [since *Everson*] and, with only one Justice dissenting on the point, it has consistently held that the [Establishment] clause "withdrew all legislative power respecting religious belief or the expression thereof."

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say

that to withstand the strictures of the Establishment Clause here must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (Citation omitted.)

What are the purpose and the primary effect of the Ten Commandments Monument?

The purpose *and* the primary effect of the action of the Boards of Commissioners is the advancement of religion. The purposes of the Eagles must be deemed to have been adopted by the Commissioners when they authorized the erection of this stone. We are entitled to assume the Commissioners could and did read the message on the stone, as well as the Eagles' statement of purposes, in evidence, and that they knew and understood what they were doing.

The message on the stone is clearly religious in character. This is demonstrated in the earlier part of this opinion, where the inscriptions are described.

The testimony of Father Wesley Frensdorff, a priest of the Episcopal Church and Dean of St. Mark's Cathedral, in Salt Lake City at the time of the trial, who had accepted the position of Episcopal Bishop of Nevada, was particularly impressive: "Q. I was asking if you have an opinion, Father Frensdorff, on whether the primary effect of this monument would be religious. "A: Certainly it would be for me. I believe it would be for the majority of people thought of in a religious context, and I certainly believe that I would find it very difficult to understand the Ten Commandments in any other than a religious context, just the very basis of it, not only its origin, but

I don't think you can take part of the Commandments and consider them separately, because they are all once piece, because the Judaic Christian tradition understands a relationship with God and with neighbors, one another as one whole, and the two cannot really be separated."

The religious message is the basic feature in the educational aims of the Eagles and the Commissioners in placing this monument.

The Court is convinced that this stone represents a conspicuous and substantial effort to impress the teaching of the inscription upon the minds of those who are constrained to visit the courthouse.

The Commissioners have given affirmative and direct aid to this teaching in the form of a financial grant. It involves direct assistance for the erection and maintainance of a monument on taxpayers' property which teaches religious theory. The religious benefits derived from this use of public money greatly outweigh any secular purposes which such aid might provide. Such assistance would seem clearly to fall within the proscription of the First Amendment's establishment clause. See *Everson v. Board of Education,* 330 U.S. 1, 15-16 (1947) where it was said: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a religion. Neither can pass laws which aid * * * one religion over another * * *. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion."

The City and County Commissions may not aid "one religion over another". In addition to being a violation of the establishment cause of the First Amendment and of the Liberty Clause of the Fourteenth Amendment, this is a violation of the Equal Protection Clause of the Fourteenth, being an invidious discrimination and unconstitutional. If all such religions, lodges or institutions are allowed to plant tombstone-like slabs on the courthouse grounds, the lawns will resemble a disorderly and unsightly cemetery. The Commissioners may be in the unenviable position of being obliged to face up to this dilemma.

Our research has revealed only a single case ruling directly upon the question whether a *permanent* religious monument could be erected and maintained upon public land. There the Oregon Supreme Court ruled, as this Court rules, that such a practice violates the Establishment Clause. *Lowe v. City of Eugene,* 463 P2d 360 (Ore., 1969), appl dismd 397 U.S. 591, *cert den.* 398 U.S. 944.

DATED this 16th day of September, 1972.

BY THE COURT

Willis W. Ritter, Chief
United States District Judge

APPENDIX

[TO OPINION OF DISTRICT COURT]

MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS

To the Honorable the General Assembly

of

the Commonwealth of Virginia.

A Memorial and Remonstrance.

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a Bill printed by order of the last Session of General Assembly, entitled "A Bill establishing a provision for Teachers of the Christian Religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerouse abuse of power, are bound as faithful members of a free State, to remonstrate against it, and to declare the reasons by which we are determined. We remonstrate against the said Bill,

1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence."[1] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right

[1] Decl. Rights, Art: 16 [Note in the original.]

towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who

are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

4. Because, the bill violates that equality which ought to be the basis of every law, and which is more indispensible, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent,"[1] all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an "*equal* title to the

[1] Decl. Rights, Art. 1. [Note in the original.]

free exercise of religion according to the dictates of conscience."[2] Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations, to believe that they either covet pre-eminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

6. Because the establishment proposed by the Bill is not requisite for the support of the Christian Religion.

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[2] Art: 16. [Note in the original.]

To say that it is, is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

7. Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration of this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have the greatest weight, when for or when against their interest?

8. Because the establishment in question is not necessary for the support of Civil Government. If it be urged as necessary for the support of Civil Government only as it is a means of supporting Religion, and it be not necessary for the latter purpose, it cannot be necessary for the former. If Religion be not within [the] cognizance of Civil Government, how can its legal establishment be said to be necessary to Civil Government? What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.

9. Because the proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its

present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy in their due extent may offer a more certain repose from his troubles.

10. Because, it will have a like tendency to banish our Citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonoured and depopulated flourishing kingdoms.

11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American Theatre has exhibited proofs, that equal and compleat liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If with the salutary effects of this system under our own eyes, we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruits of the threatened innovation. The very apperance of the Bill has trans-

formed that "Christian forbearance,[1] love and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of a law?

12. Because, the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of [revelation] from coming into the Region of it; and countenances, by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill with an ignoble and unchristian timidity would circumscribe it, with a wall of defence, against the encroachments of error.

13. Because atempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority.

14. Because a measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evi-

[1] Art. 16. [Note in the original.]

dence that it is called for by a majority of citizens; and no satisfactory method is yet proposed by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next Session of Assembly." But the representation must be made equal, before the voice either of the Representatives or of the Counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

15. Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the "basis and foundation of Government,"[1] it is enumerated with equal solemnity, or rather studied emphasis. Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they

[1] Decl. Rights-title. [Note in the original.]

may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing, may re]dound to their own praise, and may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth.

II Madison, 183-191.

SUPPLEMENTAL APPENDIX

A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION.

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the

Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians;

Be it therefore enacted by the General Assembly, That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

And be it enacted, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. The Sheriff of every County, shall, on or before the day of in every year, return to the Court, upon oath, two alphabetical lists of the payments to him made, distinguishing in columns opposite to the names of the persons who shall have paid the same, the society to which the money so paid was by them appropriated; and one column for the names where no appropriation shall be made. One of which lists, after being recorded in a book to be kept for that purpose, shall be filed by the Clerk in his office; the other shall by the Sheriff be fixed up in the Courthouse, there to remain for the inspection of all concerned. And the Sheriff, after deducting five

per centum for the collection, shall forthwith pay to such person or persons as shall be appointed to receive the same by the Vestry, Elders, or Directors, however denominated of each such society, the sum so stated to be due to that society; or in default thereof, upon the motion of such person or persons to the next or any succeeding Court, execution shall be awarded for the same against the Sheriff and his security, his and their executors or administrators; provided that ten days previous notice be given of such motion. And upon every such execution, the Officer serving the same shall proceed to immediate sale of the estate taken, and shall not accept of security for payment at the end of three months, nor to have the goods forthcoming at the day of sale; for his better direction wherein, the Clerk shall endorse upon every such execution that no security of any kind shall be taken.

And be it further enacted, That the money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever; except in the denominations of Quakers and Menonists, who may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship.

And be it enacted, That all sums which at the time of payment to the Sheriff or Collector may not be appropriated by the person paying the same, shall be accounted for with the Court in manner as by this Act is

directed; and after deducting for his collection, the Sheriff shall pay the amount thereof (upon account certified by the Court to the Auditors of Public Accounts, and by them to the Treasurer) into the public Treasury, to be disposed of under the direction of the General Assembly, for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever.

THIS Act shall commence, and be in force, from and after the day of in the year

A Copy from the Engrossed Bill.

John Beckley, C. H. D.

*Washington Mss. (Papers of George Washington, Vol. 231); Library of Congress.**

*This copy of the Assessment Bill is from one of the handbills which on December 24, 1784, when the third reading of the bill was postponed, were ordered distributed to the Virginia counties by the House of Delegates. See Journal of the Virginia House of Delegates, December 24, 1784; Eckenrode, 102-103. The bill is therefore in its final form, for it never again reached the floor of the House. Eckenrode, 113.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY 1973 TERM

[Caption Omitted]

Before MURRAH, SETH and DOYLE, Circuit Judges.

MURRAH, Circuit Judge.

The Boards of Commissioners of Salt Lake City and Salt Lake County informally permitted the Fraternal Order of Eagles to erect on city-county courthouse grounds a permanent 3x5-foot granite monolith inscribed with a version of the Ten Commandments and certain other symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ or peace. After erection of the monolith in a prominent place near the courthouse entrance, the Commissioners of the City formally authorized the installation and maintenance of lighting equipment to illuminate and enhance the display, at City and County expense. Similar monoliths have been erected in public places across the United States and Canada —nine of them in Utah—as part of the Eagles' established and continuing "youth guidance program," and ". . . to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life."

The plaintiffs, all residents and taxpayers of Salt Lake County, brought this suit seeking removal of the

monolith and an injunction prohibiting the City and County from permitting erection or maintenance of any similar monument on public land, alleging that the presence of the monolith is a violation of the Establishment Clause of the First Amendment, United States Constitution, and Article I, Section 4, of the Utah Constitution.

Upon trial, the court held that the message conveyed by the monolith was "clearly religious in character;" that by their actions the Boards of Commissioners must be deemed to have adopted the program of the Order of Eagles, with the purpose and primary effect of advancing the cause of religion and certain religious concepts, thus inhibiting the ideas of persons with alternative beliefs, contrary to the prohibitions of the Establishment and Free Exercise Clauses of the First Amendment. Judgment was entered for the plaintiffs. We cannot agree, and, therefore, reverse the judgment.

The City and County challenge the standing of the plaintiffs to bring this suit, alleging lack of a proper nexus between plaintiffs' status and the alleged constitutional infringement, and failure to show any direct injury. But we think the requisite standing is clearly conferred by non-economic religious values when the plaintiffs assert a litigable interest under the Establishment and Free Exercise Clauses of the Federal Constitution. *E.g.*, Allen v. Hickel, 424 F.2d 944, 946 (D.C. Cir. 1970), citing Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970), and Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965). We think the plaintiffs have standing based on their beliefs about re-

ligion to question whether those beliefs have been infringed upon by an alleged use of public property for religious purposes.

We do not understand either the City or County to contend that the erection and maintenance of the monolith was not done under color of state law, in the constitutional sense in which the question is presented here for decision. *Cf.* Lowe v. City of Eugene, 254 Ore. 518, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042 (1970); Allen v. Hickel, *supra* at 947; and Everson v. Board of Education, 330 U.S. 1, 15-16 (1947). The City and County do invoke the abstention doctrine, contending that the federal court should have stayed its hand while the matter in issue is litigated in the state courts under the similar clauses of the state and federal constitutions. But this is not a case or circumstance calling for abstention of the exercise of federal jurisdiction. The right asserted here is a basic First Amendment right, of which the federal court has jurisdiction, and, although a like provision of the state constitution is involved, proper resolution of the federal right is not conditioned upon resolution of any state question, law, or constitution. *See, e.g.*, Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Zwickler v. Koota, 389 U.S. 241, 248 (1967), quoting Stapleton v. Mitchell, 60 F.Supp. 51, 55 (D.C. Kan. 1945); and Monroe v. Pape, 365 U.S. 167 (1961).

This brings us to the point of applying the Establishment Clause to the facts in this case. Surely nothing we can say at this time or place concerning the scope and effect of the Establishment Clause can serve to add to what has already been so prolifically said elsewhere. From Everson v. Board of Education, *supra*, to Lemon

v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court has treated the Establishment and Free Exercise Clauses under various factual situations with perplexing diversity of views.[1] But throughout all these scholarly and authoritative writings runs a strain of consistency—one clear and distinct tenet of which we can be sure—the Constitution mandates complete government neutrality in religious matters. *See, e.g.*, Everson v. Board of Education, *supra*; and Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

The government may not ". . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ." Everson v. Board of Education, *supra* at 15. Nor can one cent of taxpayers' money be devoted to religious purposes. *E.g.*, Douglas, J., concurrence, Lemon v. Kurtzman, *supra* at 640, and Everson v. Board of Education, *supra* at 16.

In Lemon v. Kurtzman, *supra*, Chief Justice Burger reviewed and summarized the case history of the Establishment Clause. Said he, "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Judicial caveats against entangle-

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[1]For example: in Everson v. Board of Education, 330 U.S. 1 (1947), Jackson and Rutledge, JJ., filed separate dissenting opinions; in Zorach v. Clauson, 343 U.S. 306 (1952), Black, Frankfurter and Jackson, JJ., each filed a separate dissenting opinion; in McGowan v. Maryland, 366 U.S. 420 (1961), Harlan J., joined Frankfurter, J., in an 83-page dissenting opinion with two appendices; in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), Douglas, Brennan and Goldberg, JJ., each concurred separately, while Stewart, J., dissented; in Walz v. Tax Commission, 397 U.S. 664 (1970), Brennan, J., concurred specially, Harlan, J., wrote a separate opinion and Douglas, J., dissented; and, in Lemon v. Kurtzman, 403 U.S. 602 (1971), Black, J., joined Douglas, J., in a special concurrence, while Brennan and White, JJ., wrote separate opinions.

ment must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S., at 614. Writing in the same case, Mr. Justice Brennan delineated pertinent standards in these words, "[w]hat the framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." 493 U.S., at 643, quoting Abington School Dist. v. Schempp, *supra* at 294-295 (concurring opinion), and Walz v. Tax Commission, 397 U.S. 664, 680-681 (1970) (concurring opinion). From all that has been said, "[t]he test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution." *E.g.*, Abington School Dist. v. Schempp, *supra* at 222.

In applying this test, we must strike a balance between that which is primarily religious and that which is primarily secular, albeit embodying some religious impact. A tempered approach obviates the absurdity of striking down insubstantial and widely accepted references to the Diety in circumstances such as courtroom ceremony, oaths of public office, and on national currency and coin. *E.g.*, Allen v. Hickel, *supra* at 949. Overzealous rigidity may diminish or ultimately destroy

the bulwark we have erected against governmental interference in matters of religion. Walz v. Tax Commission, *supra* at 669. We know that "[t]he government may depict objects with a spiritual content, but it may not promote or give its stamp of approval to such spiritual content." Allen v. Hickel, *supra* at 948.

The decisions involving factual relationships more closely bearing upon our own case suffer from a lack of unanimity of reasoning and results. A brief reference to those cases serves to bring our case into constitutional focus. A string of lights in the form of a Latin Cross on the side of a courthouse was not a violation of the Establishment Clause because its primary purpose was found to be seasonal decoration of the downtown area for the benefit of business. *See* Paul v. Dade County, 202 So.2d 833 (Fla. App. 1967), *cert. denied*, 207 So.2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968). In Allen v. Hickel, *supra*, the plaintiffs objected to the annual erection of a creche on federal land, as part of a continuing seasonal pageant initiated in 1954. The trial court granted defendants' motion for summary judgment on grounds that the creche was only one of a group of symbols intended to represent the way Americans celebrate a particular holiday season. The Court of Appeals reasoned that the absence of evidence precluded determination of the "purpose and primary effect" of the creche, and accordingly remanded the case. Plaques were subsequently installed at the display explaining the secular purpose and history of the pageant. On remand the trial court recognized the religious significance of a nativity scene, but, in view of the additional secular significance of the creche in the over-all circumstances of the pag-

eant, held that the religious effect was not substantial, hence the creche was not proscribed. *See* Allen v. Morton, 333 F.Supp. 1083 (D.C. D.C. 1971).

In another case involving issues similar to those we face here, Lowe v. City of Eugene, *supra*, the city issued permits for erection of a permanent cross in a municipal park. Despite contentions by the city that the cross was to be a war memorial and an attraction for local business, and that the erection did not involve public expense, the court ordered removal of the monument on grounds that the cross represented preferential treatment of particular religious ideas by the municipality. In another case, an Oklahoma City resident and taxpayer brought a suit seeking an injunction to prevent the city or its officials from maintaining a 50-foot-high Latin Cross at the municipal fairgrounds. The Supreme Court of Oklahoma, affirming unanimously the sustaining of defendant's general demurrer on grounds that the cross was displayed in a "secular environment" and displayed sectarian ideas only in a "most evanescent" manner, emphasized that the action was brought only under the Oklahoma Constitution, and did not involve a question of federal relief. Meyer v. Oklahoma City, 496 P.2d 789 (Okla. 1972), *cert. denied*, 41 L.W. 3253.

It is against this background that we determine the "purpose and primary effect" of the subject monolith. The exact origin of the Ten Commandments is uncertain,[2] but testimony in the record aids the supposition that a large portion of our population believes they are Bible based. Even so, an ecclesiastical background does

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[2]See, e.g., J. Stamm and M. Andrew, The Ten Commandments in Recent Research 22-28, et seq. (2d ed. 1962).

not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular attributes. Indeed, one of the plaintiffs in our case, a lawyer, admitted while testifying that, ". . . the Ten Commandments is an affirmation of at least a precedent legal code."

Although one of the declared purposes of the monolith was to inspire respect for the law of God, yet at the same time secular purposes were also emphasized. It is noteworthy that the Order of the Eagles is not a religious organization—it is a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based, but this creed does not include any element of coercion concerning these beliefs, unless one considers it coercive to look upon the Ten Commandments. (Although they are in plain view, no one is required to read or recite them. *Cf.*, *e.g.*, Cohen v. State of California, 403 U.S. 15 (1971).)

So the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing. . . .].'" Abington School Dist. v. Schempp, *supra* at 213, quoting Memorial and Remonstrance Against Religious Assessments, as cited in Everson v. Board of Education, *supra* at 71-72 (appen-

dix to dissenting opinion). "The history of man is inseparable from the history of religion." *See* Engel v. Vitale, 370 U.S. 421, 434 (1962).

It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era. *See, e.g.*, Griswold, Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah Law Rev. 167, 173-176 (1963). The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions. *See, e.g.*, Griswold, *supra*. Although an accompanying plaque explaining the secular significance of the Ten Commandments would be appropriate in a constitutional sense, we cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects.

No one can be the judge of his own objectivity. It may well be that in this blurred, indistinct area of our national life and environment, opinions about the purpose and effect of the monolith are influenced by orthodox or unorthodox propensities. But be that as it may, we are brought to the conclusion that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief.

The judgment of the District Court is, accordingly, reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1622

ALMA F. ANDERSON, DIANA BARCLAY,
BETTY JEAN B. NEILSEN and
PARKER M. NIELSON,

Petitioners,

v.

SALT LAKE CITY CORPORATION and
SALT LAKE COUNTY, UTAH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION

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Amicus Curiae Pro se

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No. 72-1622

ALMA F. ANDERSON, DIANA BARCLAY,
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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION

FOREWORD

The records of this Court show that consent of all parties to appearance of Amicus has been timely filed. By way of introduction Amicus has participated in two prominent monument cases, *Lowe* and *Meyer*, on the side of constitutionality, and collaborated with county's counsel in a third, *Paul.* This participation, plus the considerable research and material gathered throughout the states, may be of value to this Court—to the end that

no important issues be overlooked or germane guides go unnoticed.

A Federal District Court in Utah ruled a 3' x 5' granite Ten Commandments tablet on court house grounds violative of the religion proviso of the First Amendment. This ruling was reversed by the Tenth Circuit Court of Appeals in an opinion written by The Honorable Alfred P. Murrah. This brief, in support of the position of the City and County, urges that the petition be denied.

The opinion of the District Court at 348 F. Supp. 1170, consists of 15 2/3 pages. Thirteen of these are devoted to the *Everson* dissent, Madison's Remonstrances, and the Virginia Bill. The balance is devoted to the facts of this case, the application of the law, the problem of standing and the Schempp case.

Amicus submits that the *Everson dissent* is not the law of the land, and that the Remonstrances are totally inapplicable and were aimed at the use of the taxing power for the benefit of established churches or specific sects. What Jefferson truly meant by "separation between church and state" is clearly explained in Appendix B, his little-known letter to his Attorney General, Levi Lincoln, on the same date that he wrote the Separation letter to the Danbury Baptists (Appendix A).

Absolutistic and doctrinaire interpretations of the federal religion proviso are not the techniques of today's Supreme Court. Mr. Chief Justice Burger, in *Walz*, warned against giving too much credence or emphasis to such matters as Mr. Justice Black's broad, sweeping "No Aid" dictum. Said Mr. Chief Justice Burger, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> "Our prior holdings do not call for total separation between Church and State; total separation is not possible in an absolute sense. Some relationship

between Government and religious organizations is inevitable."

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier, depending on all the circumstances of a particular relationship."

. . . . "Religious values pervade the fabric of our national life."

Madison recognized a "line" of separation in 1832, in a letter to the Reverend Jasper Adams. In *Walz*, Mr. Chief Justice Burger also talked of a "line" and Mr. Justice Harlan spoke of a "channel." Mr. Justice Jackson spoke of a serpentine wall, like the low, winding stone one which Thomas Jefferson created in one of his famous architectural gems—the University of Virginia.

The "root-and-branch" theory, heavily relied upon by the lower court, applied to the monolithic Established Church, which created strong fears in 1789. That fear, however, has long given way in history to the checks and balances of a pluralism of sects and voluntarism.

Monuments have existed as part of our cultural heritage from the days of the Pharaohs and have universally been accepted as part of the civil polity. It is submitted that the unfinished *Lowe* case in Oregon is not a precedent, but that, rather, such cases as *Paul, Meyer, Singelmann, Allen v. Morton* and others listed in Appendix E, reflect that monuments truly belong and are not ministries of Establishment as claimed in the lower court opinion.

It is submitted that the Ninth Circuit Court of Appeals, in *Aronow v. United States,* ruling that the national motto, "In God We Trust" on currency, did not violate the Establishment Clause, properly relied on *McGowan v. Maryland,* 366 U.S. 420, as a strong

authority. Both the December 19, 1969 *Lowe* opinion and the lower court, in this case at bar, have ignored or by-passed *McGowan*, which, it is submitted, is the law of the land and a vitally active precedent. Witness the language of the Ninth Circuit Court of Appeals in *Aronow*. See also the opinions of Mr. Justice Reed in *McCollum*, of Mr. Justice Douglas and Mr. Justice Stewart in *Engel v. Vitale* and the comment thereon by Robert M. Hutchins in Oakes, *The Wall Between Church and State*, 21. (U. of Chicago Press, 1963.)

The following quotation from Freund, Sutherland, Howe and Brown, *Constitutional Law*, Vol. II, page 1453 (Little, Brown & Co., 1954) is succinct, but speaks volumes:

> "The accuracy and sufficiency of Mr. Justice Rutledge's examination of the history which produced the First Amendment have been questioned by scholars, theologians, polemicists, and judges. See e.g., Corwin, The Supreme Court as National School Board, 14 Law & Contemp. Prob. 3 (1949); Parsons, The First Freedom: Considerations on Church and State in the United States (1948); O'Neill, Religion and Education under the Constitution (1949); Desmond, J., in *Zorach v. Clauson*, 303 N.Y. 161, [8] (1951). It has also been defended. See, e.g., Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp. Prob. 44 (1949); Pfeffer, Church, State and Freedom 118-159 (1953)."

ARGUMENT

I.

FACTS, INELUCTABLE FACTS, REFUTE THE THREE REASONS PETITIONER URGES FOR REVIEW.

(1) The monument serves a primary purpose and effect and is not "religious activity" proscribed by the religion proviso.

Arguments based on broad concepts of the wall of separation developed in *Everson* must now be viewed in a more mature frame as expressed in *Walz*, where this Court did not even use the *Schempp* test. See 1970 Supreme Court Review 93. Madison's Memorial and Remonstrances are not now and never have been a part of the First Amendment. Establishment means keeping the state out of the business of establishing religion–i.e. putting the state behind the rites, ritual, worship of any one religious sect.

(2) The argument that "all or substantially all religions are benefited" is invalid.

This Court, in *Zorach* and *Walz*, has amply demonstrated (a) that accommodation (if this be such, arguendo) is here to stay, and (b) its avowed and stated purpose of avoiding hostility to religion.

(3) There is no "conflict between the circuits" as to whether "purpose" and "effect" are questions of law or fact.

This Court in a series of cases–*Schempp*, *Allen*, and *Lemon*–reviewed the issues as questions of law. Mr. Justice White expressly commented on the meagerness of the record in *Allen*. Moreover, as mentioned supra, this Court did not find it desirable or necessary to use the Schempp test in *Walz*.

II.

THE TEN COMMANDMENTS CODE OF LAW IS HISTORICO-LEGAL, A CULTURAL HERITAGE AND SERVES A PRIMARY SECULAR PURPOSE AND EFFECT.

The Ten Commandments reflect the very basis of our American legal system, as well as that of the civil law of Europe. Both systems have been moulded for hundreds of years in reliance on their theme. The first three Commandments cover man's obligations to God, but the remaining and *predominant* number of the Commandments deal with man's secular duties toward man, and have been bodily carried into our own law. The Salt Lake City tablets do not state the Commandments in full, but are abbreviations of some of them. The second, third and fourth are abbreviated. See Exodus XX: 1-17.

Usually the definition of religion associates with it rewards and punishments, but only number 4 here indicates anything akin to a reward. Applying the Schempp test of primary purpose and effect, the Code deals predominantly with duties to man, which are secular. Numerous of the provisions, such as the prohibition against theft, killing, adultery and perjury, form the basis of our present civil law. The last two Commandments, dealing with coveting, constitute safeguards against the actual commission of such unsocial action, and are predominantly secular.

That the Commandments arose out of religion is not any ground for condemning them. Their value is essentially historical and to emphasize the moral foundations of the law. What more proper justification for their inclusion on City Hall or Court House grounds? What are more natural, fitting and appropriate places than City and

County Courthouses for repositories of the law and historical antecedents?

If it is appropriate for students in our public schools to study the Old Testament readings as literature, it becomes no less a secular purpose when they are engraved in stone on Court House grounds. See *Calvary Bible Presbyterian Church v. Board of Regents,* 436 P.2d 189 (Wash. 1967), cert. den. 393 U.S. 960.

Mr. Chief Justice Warren, speaking at a dedication of one of the wings of the National Cathedral in the late 1950's, spoke of religion being the subsoil of our justice. Codes antedating Alfred's, and long before Christianity, show strong religious bases.

III.

SERIOUS DANGERS INHERE IN LITIGATION IN WHICH ESTABLISHMENT IS COMPULSIVELY ASSUMED.

The facts in the opinion of the District Court are all interpreted to give the monument the glow and tincture of Establishment. As pointed out in II, supra, the Code has a predominant or primary secular purpose and effect. Important is the fact shown that *the Code is given in furtherance of a youth guidance program.* See 348 F. Supp. at 1172. This underlines the secular moral or ethical purpose, and demonstrates the high desirability of the State fostering the inculcation of noble, ethical, secular values as desirable for citizenship, especially the upbringing of its youth. There is no showing that the suggested program of dedication set out at 348 F. Supp. 1171-1172 is mandatory. There is no showing that the city and county records treat this monument as a religious monument. There is no showing that this Code is identified with a particular sect which is favored by the State.

The symbols used on the tablets have universal acceptance. Some are used by lodges and fraternal organizations. The All-Seeing Eye appears on the back of our dollar bill and is on the reverse side of our national seal. The opinion in no way sets out what the "law" is which is claimed to be proscribed or forbidden. We honor "In God We Trust" on our coins (*Aronow v. U.S.*, 432 F.2d 242 (C.A. 9, 1970)), on a plaque in back of the Speaker's rostrum in the Capitol. We have a Meditation Room between the House and Senate, complete with two large Jewish Menorah, the Bible, prayer benches, an altar, a stained glass window showing Washington kneeling at prayer, with a St. Andrew's cross in the background. Senator Javits was the first to urge utilizing this room for formal services. We have frequent services in the White House. "We are a religious people," said Mr. Justice Douglas in *Zorach v. Clauson* in the early 50's and the President, today.

Especially important is the fact that the Order of Eagles, in the words of Judge Ritter, "*donated* the stone monument and paid the expense of erecting it." In the words of *Reichwald v. Catholic Bishop of Chicago*, 101 N.E. 266 (Ill., 1913), the city gave nothing, but actually received something. Since this was a gift, the title has passed to the city. Nothing is being maintained by any religious sect, nor is there any specific appropriation or aiding. The city ground is there whether or not the item is displayed upon it. The acceptance of a gift from a secular group does not constitute endorsement of any religion any more than the using on a United States Postage Stamp (Madonna and child) of a religious picture constitutes endorsement of religion by the United States, or a local church with cross atop it portrayed in part of a mural in Eugene, Oregon's City Hall Council Chamber.

The State of California does not endorse the Catholic religion simply because certain early Catholic missions are under supervision of its state park system, nor does San Francisco endorse Buddhism by acceptance of a large statue of Buddha, complete with a Wheel of Life symbol, from its sister city in Japan. Decoration does not constitute adoption.

This Ten Commandments tablet involves *none* of the usual Establishment practices:

(1) No compulsion to attend religious services or to accept any dogma, rites or ritual.

(2) There are no official confessions of faith.

(3) There are no impositions of tithes or taxes for churches or ministers.

(4) There are no criminal punishments or civil disabilities for religious dissenters.

IV.

HISTORY, INCONTROVERTIBLE HISTORY, SUPPORTS THE LEGALITY OF THIS MONUMENT.

(1) The preeminent traditions and customs of monuments, predate Christianity, going back thousands of years to Egypt. Monuments, like certain tax exemptions given public buildings and private places of worship, imply public benefit, serve public good and happiness. As such, they are "inseparably interwoven with the structure of government and the habits and convictions of our people." Cf. *Yale University v. Town of New Haven*, 71 Conn. 316, 42 A. 87, 92 (1899). See Mr. Justice Reed in *McCollum v. Board of Education*, 333 U.S. 203, at 303.

Monuments belong and are of far more ancient vintage than bus transportation, Bible reading, or prayers in public schools. "The power of precedent is the power of

the beaten track," said Mr. Justice Cardozo. The antiquity and the universality of the practice would, indeed, take a strong case to bring it within the First Amendment. See statement of Mr. Justice Holmes cited in *Lincoln v. Page*, 241 A.2d 799 at 800 (N.H., 1968).

(2) Here is permissibility with barely a single adverse judicial precedent under State and Federal Constitutions, among cases fully completed.

(3) This monument, and monuments in general, are not, in fact, a series of steps toward the establishment of a national religion. The tradition, custom and practice is deeply interwoven into the civil polity and accepted by the people. See *Schempp*, 374 U.S. 203, at 303.

(4) Monuments reflect the culture and the common places of community. Grounded in history and heritage, monuments are part of the culture of the community and community life. Recognition of religion is not religion qua religion or religion per se, nor is it proscribed by the Federal Constitution. *In re Opinion of the Justices*, 9 N.E.2d 753 (Mass. 1937).

The briefs of Amicus in *Meyer v. Oklahoma City*, supra, set forth additional supporting material.

V.

MONUMENTS ARE FIRST AND NINTH AMENDMENT EXPRESSIONS OF THE PEOPLE.

Monuments are a part of the people's cultural expression, of their First Amendment rights to speech, press, association, of their right to happiness. Individuals, under the First and Ninth Amendment zones, have the rights to live in, and enjoy life in a community, to use public facilities, to engage in political and social activity. Permanently recurring, year after year, fiesta celebrations

of old mission days in California cities are not establishments of religion. The right to have monuments and memorials commemorating civic aspirations, accomplishments or events in a cultural, political, social, historical, religio-cultural, patriotic or aesthetic framework on publicly owned property is well settled. (Parks, squares, buildings) *Parsons v. Van Wyck*, 67 N.Y.S. 1054, 56 App. Div. 339 (1900), *Allen v. Morton*, 333 F. Supp. 1088, *Paul v. Dade County*, 202 So.2d 833, cert. den. 390 U.S. 1941 (1968).

The "preliminary arrangements" mentioned by the District Court, 348 F.Supp. at 1171-1172, are of no more significance than the fact pattern in *Meyer v. Oklahoma City*, supra.

The record is barren of any religious exercises, silent as to devout crossings, prayers, genuflections or one single indicia of religious worship. Things become holy by association with things holy, said the theologian, Tillich.

VI.

THE CLAIM THAT THE MONUMENT VIOLATES THE LIBERTY AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT LACKS SUBSTANCE.

(1) The facts are barren as to any showing that anyone's liberty has been taken or infringed, or that there is any threat to circumscribe anyone's liberty—either personal or religious. Before a claim can be made, facts should be asserted demonstrating such denial.

(2) It is submitted that the invocation of the Equal Protection clause is inapropos because there are no facts asserted to show any claimed invidious discrimination. At 348 F. Supp. 1180, the Court, in its "unsightly cemetary" argument, erects a straw man and then proceeds to

knock it down. No facts in the opinion support the assumption of the Court that there would be any proliferation of monuments.

Such is a typical argument used in monument cases by those assailing legality. Cities and counties and states have a reasonable say as to what may go on the property, and as long as the monument remains in the "gift" class, the city has a right to accept or reject it. Gifts of art tend to be individualistic and usually complement, rather than jar, the setting.

San Francisco's Golden Gate Park contains a 50-foot Prayer Cross, a beacon cross over 100 feet, a figure of Father Serra with cross, a statue of St. Francis, a totem pole, and a large statue of Buddha. The Young Museum therein contains innumerable works of religious art. Rather than being an "unsightly cemetery", it is one of American's most beautiful composites of blended culture, tradition and heritage.

City halls and county buildings are natural repositories for law. New Haven, Connecticut, is reported to have a statue of Moses with the Ten Commandment tablets in hand on public property.

In the Ceremonial Court Room of the United States Court House in Washington, D.C. appears a large figure of Moses, one hand with finger raised; the other, holding the Tablets. Many small crosses appear on the decorative patterns of the doors. A cross and what appears to be Tablets decorate the top of a monument in the curtilage of this Court House. Above the chair of the Chief Justice, on the frieze, in center stage, so to speak, in the Courtroom of the Supreme Court of the United States, is the figure of Moses holding the Tablets.

Numerous cities, counties and state capitols over the land have Ten Commandment tablets. It is inconceivable

that any city or county would refuse gift of a tasteful and fitting statue or monument recognizing the giving of laws, such as King Alfred, Solon, Moses, Justinian, the Code of Hammurabi, the Magna Charta, the Petition of Rights, or other code or landmark charter.

The three pence tax idea (Madison took this from the three pence tea tax which occasioned the Boston Tea Party) has no germane application to the case at bar. The matter is answered by asking, "Who is taxing whom for what?" We do not need to be concerned that monuments will become a "raging torrent". In over 5,000 years, where have there been undue proliferations of monuments? Not one, single, solitary place has been cited.

Mr. Justice Tobriner in *People v. Woody*, 394 P.2d 813, 817 (Cal., 1964), states that "the varying currents of our subcultures that flow into the main stream of our national life give it depth and beauty." This is true of monuments.

VII.

THE LOWER COURT'S ABSOLUTISTIC POSTURE ON ESTABLISHMENT IS UNTENABLE AND UNSUPPORTED IN HISTORY OR BY AUTHORITY.

(1) The absolute no-aid theory of Mr. Justice Routledge, in the *Everson* dissent is not the law. And Mr. Justice Burger, in *Walz*, referring specifically to Mr. Justice Black's "no-aid" dicta, shows the danger of such generalizations in dicta. We have moved from a "wall" to a "line". Madison himself came to adopt the "line" theory in 1832; and in *Walz*, both the Chief Justice and Mr. Justice Harlan used like or similar terms.

(2) The Remonstrances are neither statutes nor the Constitution and are totally inapplicable. No one is being

compelled to pay a tax to support religious activities. The state is not being used as an instrument to *compel* exercise, worship, ritual or creed. It taxes nothing; it demands nothing. Mr. Justice Douglas, in dissent in *McGowan v. Maryland*, 366 U.S. 577-579, most clearly states the real significance of the Virginia tax:

> "In large measure, the history of the religious clause of the First Amendment was a struggle to be free of economic sanctions for adherence to one's religion. (*Everson*) A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax * * * As a result, the tax measure was defeated and, instead, Virginia's famous 'Bill for Religious Liberty', written by Jefferson, was enacted."
>
> "The reverse side of an 'establishment' is a burden on the 'free exercise' of religion. Receipts of funds from the State benefits the established church directly, laying an extra tax on nonmembers benefits the established church indirectly * * *"

(3) "Separation" as used by Jefferson in his "wall" letter (figure of speech in a letter, not a law, not a constitutional provision) meant the Exercise provision. Thus, a contemporaneous letter to Levi Lincoln (his Attorney General) treats of the Establishment provision. There he talks of "alliance between Church and State" (capitalized)–and he meant the Established Church of the day. See Appendix B.

(4) The courts appear never to apply the Establishment provision in isolation. They take the Exercise Clause into account. Giannella, 81 H.L.R. 513, 521 (1968); Drinan, 1967 Utah L.R. 491, 514.

(5) Monuments in no way significantly affect religious liberty. Said the late Mark DeWolfe Howe, a clerk

of Mr. Justice Holmes and later a leading church-state authority at Harvard Law School:

> "[The] religious clauses were adopted in order that the nation's authority should never be brought on matters which were not of *national* concern." See essay in *Nomos IV* by Friedrich, 262, 266 (1962).

(6) Accommodation is here to stay. The lists of aids to the state is long and impressive. The aid proscribed is not all aid, but that aid which performs "ecclesiastical functions." See Mr. Justice Reed in *McCollum*, 333 U.S. at 246.

(7) Monuments are local matters to be handled at a local level.

(8) The Supreme Court closely scrutinizes, in Establishment claims, the "excessive entanglement" with religion. This is clear from *Walz, Lemon* and *Tilton*.

(9) The school cases (*McCollum, Schempp, Engel, Epperson*) *all* involve religious instruction and worship (Exercise) as well as the Establishment factor and involve young people of plastic minds and not adults. They are clearly distinguishable.

(10) We have come from the "wholesome neutrality" of *Schempp* to the "benevolent" neutrality of *Walz*, to the "excessive entanglements" test in *Walz, Lemon* and *Tilton*. If "no aid" were the test, as the District Court contends, why were the adjectives "wholesome" and "benevolent" used? Why was the "excessive entanglements" test added?

CONCLUSION

This monument is not representing the City, a religion per se or a church. It is not sponsored by a church or sect; it is not an object of worship, nor in a situs of

worship. No governmental body is being used as the instrument of a church. There is no aid to any church or religious sect, no control of government over religion or vice versa, no compulsion to use or to view or to worship, to underwrite or to pay taxes for. There is no sponsorship, maintenance or support (financial)[1] by any religious group of any description and no authority delegated by a governmental body to a church or sect or to religion qua religion. Recognition is not religion. Decoration is not indoctrination. Decoration is not endorsement. See *Thomas v. Daughters of Utah Pioneers*, 197 P.2d 447 (Utah, 1948).

The essence of what is to be feared is this: the State's putting itself behind and favoring the rites, rituals, worship of any one sect. Such is the message of Thomas Jefferson in his letter to Levi Lincoln.

We must beware lest a miniscule minority sweep away the rights of the vast majority. Griswold, "Absolute is in the Dark," 8 Utah L.R. 167 (1963). Tradition should mean much. In *Walz*, Mr. Justice Brennan states:

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[1]Words used by the writer in *Lowe* brief in 1967, p. 167. In 1970 in *Walz*, 397 U.S. 398, Mr. Chief Justice Burger wrote:

> "It is sufficient that for the men who wrote the Religious Clauses of the First Amendment the 'establishment' of a religion connote sponsorship, financial support and active involvement of the sovereign in religious activity."

In *Tilton v. Richardson*, 29 L.Ed.2d 798, 799, the Court considered *four* questions:

> "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive governmental entanglement with religion? Fourth, *does the implementation of the Act inhibit the free exercise of religion*?"

> "The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation."

Monuments, as well as church tax exemptions, should be "accepted as a matter of course", in the words of Mr. Justice Harlan in *Walz*. See also 374 U.S. at 423. Professor Freund, with acuity points out, in *Time*, December 11, 1964, p. 59:

> "It is hard to see how such things can be challenged in law so long as they are not addressed to a captive audience and do not call for a profession of commitment or rejection on the part of those who witness them."

Monuments such as this are graven into the civic polity. It is well recorded in Proverbs 22:28—Remove not the ancient landmark, which thy fathers have set. In the respected words of Judge Murrah's opinion "wholesome neutrality" does not "dictate obliteration" of this "passive monument," and this is the common "sense and sensibility" of the matter, to paraphrase a book title from the gentle Jane Austen. The petition should be denied.

Respectfully submitted,

WARREN CAMERON
4034 85th Street, S.E.
Mercer Island
Seattle, Washington 98040
Amicus Curiae Pro se

APPENDIX "A"

LETTER OF THOMAS JEFFERSON TO THE DANBURY BAPTIST ASSOCIATION JANUARY 1, 1802

Gentlemen:—The affectionate sentiments of esteem and approbation which you are so good as to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem.

From Koch and Peden *The Life and Selected Writings of Jefferson*, pp. 332-333 (Modern Library, N.Y. 1944).

APPENDIX "B"

LETTER OF THOMAS JEFFERSON TO LEVI LINCOLN, HIS ATTORNEY GENERAL.

Jan. 1, 1802.

Averse to receive addresses, yet unable to prevent them, I have generally endeavored to turn them to some account, by making them the occasion, by way of answer, of sowing useful truths & principles among the people, which might germinate and become rooted among their political tenets. *The Baptist address, now enclosed, admits of a condemnation of the alliance between Church and State, under the authority of the Constitution.* It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings & thanksgivings, as my predecessors did.

The address, to be sure, does not point at this, & it's [sic] introduction is awkward. But I foresee no opportunity of doing it more pertinently. I know it will give great offence to the New England clergy; but the advocate of religious freedom is to expect neither peace nor forgiveness from them. Will you be so good as to examine the answer, and suggest any alterations which might prevent an ill effect, or promote a good one among the people? You understand the temper of those in the North, and can weaken it, therefore, to their stomachs: it is at present seasoned to the Southern taste only. I would ask the favor of you to return it, with the address, in the course of the day or evening. Health & affection. (Emphasis supplied)

From Ford *Works of Thomas Jefferson*, Federal edition, Vol. IX, pp. 346-347 (Putnam, N.Y. 1905).

IMPORTANT POST-BRIEF DISCOVERY–June 29, 1973
Danbury Letter Rough Draft Sheds New Light on Wall

Amicus examined the rough draft with these findings:

(1) The word "eternal" after "a wall of" was deleted. This may have indicated lack of permanent fixity of mind or room for future mobility. People freely talk of separation "of". The letter carefully uses the preposition "between".

(2) After the words "church and state" Jefferson included in his rough draft the sentence shown in footnote 1.

This sentence was omitted in the final draft on advice of Levi Lincoln, as a side note shows. The words "national church" show, ineluctably, that Jefferson feared a fused Church and State.

(3) Powerful lenses and photographic magnification, part of the technique used by Amicus in finding Oregon's missing Establishment provision, are needed to decipher three or four lines Jefferson marked out.

Madison's Memorial and Remonstrances were aimed at taxation not decoration (monuments). Consider well the millions of dollars in aid appropriated by Congress for religious nations. That which shores up and financially aids a religious people in its religious mission may well be more than "political." This could be the "raging torrent" feared by Madison. The command of the First Amendment reads: "Congress shall make *no* law respecting *an* establishment of religion . . ."

---

[1] "Congress thus inhibited from acts respecting religion, and the Executive authorized only to execute their acts, I have refrained from prescribing even occasional performances of devotion, prescribed indeed legally where an Executive is the legal head of a *national church*, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect."

APPENDIX "C"

OREGON'S MISSING NO ESTABLISHMENT PROVISION OMITTED FROM 1859 CONSTITUTION THROUGH A CLERK'S ERROR AND DISCOVERED NOVEMBER 17, 1967

Original records of the proceedings of the Oregon Constitutional Convention in 1858 on public file show the Establishment section was adopted by the Convention, but omitted through a Clerk's error in the engrossing.

OREGON CONSTITUTION	INDIANA CONSTITUTION
ARTICLE I, SEC. 2:	ARTICLE I, SEC. 2:
"Freedom of Worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."	"Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."
ARTICLE I, SEC. 3:	ARTICLE I, SEC. 3:
"Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions or interfere with the rights of conscience."	"Freedom of religion. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."
	ARTICLE I, SEC. 4:
OMITTED	"Creedal preference. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."
ARTICLE I, SEC. 4:	ARTICLE I, SEC. 5:
"No religious qualification for office. No religious test shall be required as a qualification for any office of trust or profit."	"Religious test for office. No religious test shall be required, as a qualification for any office of trust or profit."

ARTICLE I, SEC. 5:

"No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

ARTICLE I, SEC. 6:

"No state aid for religious institutions. No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

ARTICLE I, SEC. 6:

"No religious test for witnesses or jurors. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic] nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony."

ARTICLE I, SEC. 7:

"Religion no bar to competency of witnesses. No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion."

APPENDIX "D"

CITY OF EUGENE
DEPARTMENT OF FINANCING
EUGENE, OREGON 97401

CHARTER AMENDMENT SUBMITTED BY INITIATIVE PETITION TO THE VOTERS OF EUGENE, OREGON

AN ACT

To amend Section 153 of Part I of the Charter of the City of Eugene, Oregon by empowering the City of Eugene to accept a deed of gift of a concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park to be dedicated and maintained as a monument and memorial to United States war veterans and to be named the Veterans War Memorial Cross and authorizing the control and lighting of said structure by the Park and Recreation Department of the City of Eugene.

APPENDIX "D" (continued)
Eugene 1970 Charter Amendment (cont'd)

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

BE IT ENACTED BY THE ELECTORS OF THE CITY OF EUGENE, OREGON, that Section 153 of Part 1, Miscellaneous Provisions of the Eugene City Charter be and the same is hereby amended to add the following provisions thereto:

SECTION 1. That the City of Eugene be and is hereby empowered, and by this Act does, accept a deed of gift of the concrete structure in the form of a cross now located on the south slope of Skinner's Butte Park.

SECTION 2. That the concrete cross structure shall remain at said location and in said form and is hereby dedicated as a memorial and monument to the war veterans of all wars in which the United States has participated and that said memorial shall hereinafter be known as the "Veterans War Memorial Cross."

SECTION 3. That the American Legion, Eugene Post No. 3 be and is hereby authorized at its own expense to prepare and affix to said structure a suitable and fitting plaque and other ornamentations consistent with the intendments of this act.

SECTION 4. That the control and lighting of said structure is hereby designated as a responsibility of the Park and Recreation Department of the City of Eugene and is hereby directed to light on appropriate days or seasons which fittingly represent the patriotic aspects, aspirations and sacrifice of war veterans, including but not limited to, Memorial Day, Independence Day, Thanksgiving, and the Christmas Season, and Veterans Day.

I hereby certify that this is a true and correct copy of Initiative submitted to the voters of the City of Eugene on May 6, 1970, and that the measure passed, with official returns 17,185 votes "Yes" to 6,009 votes "No."

s/s S.P. FLOGSTAD
S.P. Flogstad, City Recorder
June 4, 1970

Seal of
The City
of Eugene

APPENDIX "E"

1970 LIST OF CASES DIRECTLY OR TANGENTIALLY SUPPORTING RESPONDENTS

(Cases 1970-to date appear in Table of Authorities)

Federal Cases

Board of Education Central School Dist. No. 1 v. Allen, 392 US 236; *Zorach v. Clauson*, 343 US 306; *Paul v. Dade County*, 202 So2d 833 (Fla Ct App), cert den Fla Sup Ct 207 So2d 690, cert den 390 US 1041; *Chamberlain v. Dade County Board of Public Instruction*, 143 So2d 21 rev'd other gds 377 US 402, *Lewis v. Allen*, 11 App Div 2nd 447, aff'd NYS 2d 867, cert den 379 US 923; *Smith v. Denny*, 280 F Supp 651 (D.C. Cal 1968); *Protestants and Other Americans United for Separation of Church and State et al v. O'Brien*, 272 F Supp 712 (USDC 1967); *Sheldon v. Fannin*, 221 F Supp 766, 774 (USDC Ariz 1963); *Walz v. Tax Commission of the City of New York*, 397 US 664.

State Cases

Brown v. Heller, 273 NYS 713 (1966); *State ex rel Singelmann v. Morrison*, 57 So2d 238 (Ct App La 1952); *State ex rel Johnson v. Boyd*, 217 Ind 348, 28 NE2d 256 (1940); *Craig v. Mercy Hospital-Street Memorial*, 45 So2d 809, 817 (Miss 1950); *Sawyer v. City of Norfolk, et al* (Virginia Circuit Court, City of Norfolk, Chancery No. 7252-C, 1962); *Tompkins v. Hodgson*, 2 Hun 146 (NY 1874); *Parsons v. Van Wyck*, 56 App Div 329, 67 NYS 1054 (1900); *Brahan v. City of Meridian*, 111 Miss 30, 71 So 170 (1916); *Vale v. City of San Bernardino*, 109 Cal App 102, 292 P 689 (1930); *Baer v. Kolmorgen*, 181 NYS 2d 230 (Sup Ct, NY 1958); *Lawrence v. Buchmueller*, 243 NYS 2d 87 (Sup Ct NY 1963); *Los Angeles County v. Hollinger*, 19 Cal Rptr 648 (DCA Cal 1962); *Koerner v. Borck*, 100 So2d 398 (Fla 1958); *Opinion of the Justices*, 228 A2d 161 (NH 1967).

APPENDIX "F"

BACKGROUND TO EUGENE'S WAR MEMORIAL CROSS CASE

Joined as Plaintiffs in the suit to set aside the Decree in *Lowe* are the private erectors, the City, and American Legion, Eugene Post No. 3. *Lowe* referred to in Judge Ritter's opinion is thus being re-litigated. The case is still in the pleading stage.

Close attention is called to the majority opinion, February 26, 1969, at 451 P.2d 117. The facts show no hint or tint of a religious sect, religious purpose, coercion, oppression or taxation. Mr. Justice Langtry pointed out that in 1966 the defendants in *Lowe* timely raised the park purposes and city charter issue in their pleadings, only to have them stricken and the cause tried solely on "constitutional issues". Then, purporting to "avoid the constitutional issue," the trial judge, The Honorable William Fort, decided the matter on the city charter-park purposes issue, on which defendants had no day in court. Both state statutes and city charter provided for "ornamentation" in public parks. This was one of twenty assigned errors, which included other denials of due process.

During appeal to the Supreme Court of Oregon, Amicus discovered, without laches, the 1934 War Memorial Park Dedication of the park on which the cross is located. Shortly thereafter, Amicus discovered, also, that the Establishment provision, supposed to have gone into the Oregon State Constitution in 1859 and taken from Indiana, was inadvertently omitted. See Appendix C. While the cause was in the United States Supreme Court, the people of Eugene, in a Charter Amendment, overwhelmingly declared the monument itself to be a war memorial. See Appendix D.

CRITIQUE OF DECEMBER 19, 1969, OPINION OF MR. JUSTICE GOODWIN IN *LOWE*, 463 P.2d 361

(1) An assumption of Establishment belies the February 26, 1969 findings of the Court (451 P.2d 1117). The testimony is unequivocal that the donor of the cross, assisted by other Chamber of Commerce members, gave it as a gift to the City. The express purpose in the building permit was "admiration," or beauty–ornamentation–a primary secular purpose. No religious sect or church was involved, nor did the edifice meet any of the indicia of Establishment shown in the Conclusion of this Amicus brief.

(2) The Court's "endorsement" theory, using the school cases (*Engel, McCollum, Schempp, Epperson*) is not apt. No coercion, oppression or use of tax money was shown, nor was any religious sect involved in *Lowe*. Accommodation is the rule today (Walz). *Nowhere* were any ecclesiastical practices shown in the evidence.

(3) Mr. Justice Goodwin's guidelines as to monuments in the opinion controvert both history and impressive judicial precedent. At 463 P.2d 363, the Justice states

> "A public monument depicting a biblical [sic] character or religious symbol would tend to sponsor the religion rather than to honor a famous person."

If "biblical" means a ban on personages of the Old and New Testament, then, is not the Justice showing an unconstitutional bias in disfavoring one religious group for others, or those of no creed–contrary to the creedal no-preference clause found in most state Establishment provisions?[2]

---

[2] From Salem, Massachusetts to Washington, D.C. to Miami, to Mobile to New Orleans to Los Angeles to Salem, Oregon, and back,

(4) Cross monuments are universal in extent, ubiquitous in use and multifold in meaning. Three cross litigations in the three different geographical areas show three separate primary secular meanings: *Paul*–Season's Greetings; *Lowe*–Veterans Memorial; and *Meyer*–the peace and order of the Fair.

(5) In avoiding the missing Establishment provision (See Appendix C), the Court read into Article I, Section 5 (a *supplementary* section prohibiting funds from the State Treasury for religious and theological schools and institutions) something beyond the true words, meaning and import of the section. The rule of interpreting a constitution according to its plain meaning is a prime one in constitutional construction. Black, *Handbook on Interpretation of the Laws,* p. 25 (West Pub. Co.). Provisions *in 23 other state constitutions,* similar in sweep and content to Article I, Section 5 (taken from Indiana, also) support the contention of the writer of this brief. Article I, Section 5 was *never* meant, according to the Oregon Founding Fathers, to be a complete Establishment provision. It was meant to augment it. See Carey, *The Oregon Constitution* (Oregon State Printing Plant, 1924.)

(6) No *official* record of the City shows one iota of evidence (nor was any proferred at trial) that the majority of the community viewed the edifice with approval because it "reinforced their religious preferences." The city council records are available and open for inspection. This posture of the Supreme Court of Oregon is in conflict with *McGowan v. Maryland,* 366 U.S. 420, the law of the land, which is neither cited nor

---

far and wide, innumerable monuments, including crosses, express the culture, traditions and heritage of the people of the United States.

considered. Said the Supreme Court of the United States in *McGowan* at page 442:

> "The Establishment clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

and at pages 444-445:

> "The fact that this may be of particular significance for the dominant Christian sects does not bar the State from achieving its secular goals."

(7) We must beware lest claims for individual rights work absolute secularism and thus destroy collective rights of the people to full heritage and traditions under the religion proviso. A notable comment by Bernard Coughlin in Religion and the Public Order, Vol. V (1969) seems apt:

> "The Supreme Court has the unenviable task of upholding the principle of Church-State separation on the one hand and allowing policies that encourage the cultural contributions of religion and voluntarism on the other. In the past, the Court has focused on the principle of separation as it affects individual rights, with little express attention directed to the long range cultural implications of its decisions. Nevertheless, there is a favorable climate of opinion and sufficient precedent on which to develop a view of separation that keeps the State and the Church truly separate, and at the same time encourages the social and cultural contributions of the churches. It would seem desirable to develop this precedent if religion and voluntarism are to endure as national values."

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IN THE

Supreme Court of the United States

October Term 1973

No. 72-1622

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,

Petitioners,

vs.

SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted] Respondents' [redacted] BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In Support of Respondents' Position

REASONS FOR DENYING THE WRIT

ARGUMENT

I

PETITIONERS' THREE POINTS ARE LITERALLY UP-ENDED BY LEADING CASE LAW AND THE SOCIAL AND CULTURAL HISTORY OF OUR COUNTRY.

(a) In this case of *Anderson v. Salt Lake City Corporation*, 348 F. Supp. 1170, (D.C. Utah 1972), the Tenth Circuit Court, in an unanimous opinion, reversed the District Court's decision. Circuit Judge Murrah wrote a commentworthy opinion, and, with impeccable exactness, did the job of distinguishing the *Anderson* case from others offered in opposition.

Judge Murrah summarized these distinctions by adding, "It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era." (App. 45a).

No one is coerced to look upon the Ten Commandments monument, as Judge Murrah said. Perhaps, with tongue in cheek, the Judge made reference to *Cohen v. State of California*, 403 U.S. 15 (1971). ("Although they are in plain view, no one is required to read or recite them)". (App. 44a).

An appropriate similar paraphrase of this admonition in *Cohen* is found in a new Utah Law Review article, Volume 4, 1972, page 503. It is verbosely entitled, *"He that Hath Eyes to See, Let Him See; He that is offended, Let Him Look the Other Way—Obscenity Law and Artistic Expression"*. Although the *Cohen* decision found its roots in the so-called obscenity law violations, there may be a moral here, as the same admonitions, for adequate reasons, seem applicable to this secular-religious monument located on the courthouse lawn in Salt Lake City.

(b) In citing the 1947 *Everson v. Board of Education* case, 330 U.S. 1, in support of his argument for

a writ of Certiorari, petitioners overlook the fact that the 1970 *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, rejected the absolutistic "no aid" dicta of the *Everson* case. It further ruled that Establishment of a religion involved "sponsorship, financial support, and active involvement of the sovereign in religious activity." The position sometimes enjoyed by the absolute secularists is up-ended by the *Walz* decision. Mr. Justice Burger stated, in substance, in his opinion there, that an essential part of adjudication, when interpreting the constitution, is the drawing of distinctions, including the fine ones. Further, that courts have long been required to determine what *acts* violate the religious cases of the First Amendment, and whether they establish or interfere with religion.

Mr. Justice Burger, in his *Walz* case opinion, cited Mr. Justice Douglas in the case of *Zorach v. Clauson,* 343 U.S. 306 (1952), who, in writing for the court noted:

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."

Mr. Justice Douglas continued, "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of his adherents and the appeal of its dogma."

Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner,* 374 U.S. 398 (1963), saying that the constitutional neutrality imposed on us "is not so narrow a channel that the slight-

est deviation from an absolutely straight course leads to condemnation."

To paraphrase the good book, the Letter of the Law killeth, and the Spirit of the Law Giveth Life. *New Testament,* II Corinthians, Ch. 3, Verse 6.

The urging of Petitioners to grant their Writ to prevent "emasculation of prior rulings" of this court is simply without substance or merit.

(c) As to Petitioners proposition III, one's first reaction might be, what basic difference does it make whether "purpose" and "effect" are questions of fact or law? Do the Circuits need "guidance" in this regard, as Petitioners request?

Petitioners aver that the *Anderson* case (supra) was tried with the understanding that all parties considered "purpose" and "effect" were factual matters, to be determined by the court from the evidence presented. This respondent respectfully takes exception to this claim.

The criteria of the *Abington Township School District v. Schempp case,* 374 US 203, (1963), has been regarded as a question of law in several recent cases. Among these are: *Woman v. Essex,* 342 F. Supp. 399 (1972); *Woman vs. Kosydar,* 353 F. Supp. 744 (1972); *Lemon v. Kurtzman,* 403 U.S. 603 (1971); *Allen v. Morton* (formerly *Allen v. Hickel*), 333 F. Supp. 1088 (U.S. D.C. D.C. 1971) and the *Schempp* case itself. Therefore this argument, this respondent contends, should be summarily rejected.

(d) Petitioners, in their "Statement," on page 5 of their brief, complain that the Circuit Court failed

to discuss the "meaning and effect of Rule 52 (a), *Federal Rules of Civil Procedure.*" They further contend that the district court's findings of fact should have been held to be "clearly erroneous" by the Circuit court. This respondent finds nothing to require the Circuit court to discuss Rule 52 (a), nor use the phrase, "clearly erroneous," as relate to the findings.

One of the key decisions which interpret Rule 52 (a) is the 1948 case, *United States v. United States Gypsum Co.,* 333 U.S. 364. Mr. Justice Reed, writing for the court in that case concluded with an often-quoted formulation, that "A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Circuit Court, with three judges, were unanimous in their opinion to reverse the district court decision. After reading the record, they may have believed, as this respondent did, that the district court judge closed his ears to the evidence of defendants, barely suffered through the expert testimony presented by the defendants, and then failed to accurately apply existing case law to the facts of the *Anderson* case, (supra).

The Fifth Circuit, in the case of *Western Cotton Oil Co. v. Hodges,* (CA 5th, 1954), 218 F2d 158, proposes a three-point test, which, when applied to the *Anderson* case (supra), would uphold the district court findings as "clearly erroneous." A full treatise on this respondent's position here is found in *Moore Federal Practice,* Volume 5A, pages 2613-2661, inclusive.

II

ACCOMMODATION IS THE LAW OF THE LAND

Accommodation is squarely the policy of the Supreme Court today, and is the law of the land. Accommodation means this: that there will be gracious toleration of religion and all religions; that the State may and can accommodate all with "benevolent neutrality" in ways that neither involve oppression nor deprivation of Exercise or tax, identifiably, for essentially ecclesiastical purposes, *Doremus vs. Board of Education,* 342 U.S. 429, 432-433 (1952). Said Judge Froessel of the New York Court of Appeals in *Zorach v. Clauson,* at the state level, 303 N.Y. 171, 172, 100 NE 2d at 467, the "wall"

> "is designed as a reasonable line of demarcation between friends and not an iron curtain as between foes."

The State is not to be manipulated into a position of being anti-religion, nor of pitting one irreligion against religion. *Lewis v. Allen,* 159 NYS 2d 807, 812-813 (1957); *McGowan v. Maryland,* 366 U S 420, 444-445, Readers Digest, Feb. 1965, pp 49-51. Accommodation is here to stay.[1]

---

1 The catalogue of accommodations is long and impressive. See **McCollum v. Board of Education,** 333 U S 203, 238, 248, 255-256; **Zorach v. Clauson,** 343 U S 306, 312-313; **Engel v. Vitale,** 370 U S 421, 435 (footnote 21), 437 (footnote 1), 440-441 (footnote 5), 446-450 (1962); **School District of Abington Township v. Schempp,** 374 U S 203, 212-213, 394-296, 303-304, 314 (1963); Fellman, "Separation of Church and State", 1950 Wis. L. R. 427, 743-475; Oaks, **The Wall Between Church and State,** p. 21 (U. of Chicago Press, 1963); Konvitz, **Fundamental Liberties of a Free People,** Chap. 7 (Cornell U. Press, 1957).

Two other references should be mentioned here on this subject of "Accommodation."

A leading church-state authority, Professor Paul Kauper of Michigan in "The Walz Decision," 69 Mich. L. Rev. 179, 196-198 (1970), highlights the significance of the case, thus:

> (1) A long established practice has persuasive practical value as an aid in construing the Establishment clause.
>
> (2) The Court eschews absolute and rhetorical extremes and speaks of "realistic and sensible solutions."
>
> (3) Emphasis on the general purposes of the twin religion clauses, Exercise and Establishment, to promote and protect religious liberty.
>
> (4) Stresses the "benevolent neutralist" of accommodation which accords a central place to religious liberty.
>
> "*Walz* is important because it affirms the accommodation theory in a striking way, notwithstanding what has been said in intervening opinions about neutrality and secular purpose."

In the leading case of *Milwaukee County v. Carter*, 258 Wis. 139 45 N W 2d 90, 92 (1950), the Supreme Court of Wisconsin observed that a different rule applies to the use of public parks than to public school buildings:

> "However, although under Art. I, Sec. 18, Wis. Const., and the decision of this court in the Weiss case, supra, and other cases, and likewise the decision of the Unietd States Supreme Court

> in the McCollum case, supra, such use of tax-supported public school property and public school funds is prohibited, *no such restriction is considered applicable under the recent decisions of the United States Supreme Court to the use of public parks or streets by the people in their constitutional right to peaceably assemble in the free and orderly exercise of their religion and the freedom of speech, and of the press, as provided in the First Amendment to the United States Constitution.*" (Emphasis supplied.)

III

LOCAL MONUMENTS ARE LOCAL MATTERS AND SHOULD BE TREATED BY LOCAL AUTHORITIES ON A LOCAL LEVEL.

The recent Solicitor General of the United States, the Honorable Erwin N. Griswold, while Dean of the Harvard Law School, sharply criticized the absolutistic approach in his classic article, "Absolute is in the Dark," 8 Utah Law Rev 167 (1963). At page 175, he stated:

> " * * * There are some matters which should be settled on a local level in each community and should not become great Supreme Court cases. This can be presented on an essentially legal level in terms of 'standing to sue' and this has been thoughtfully developed by my colleague, Professor Sutherland."

The late Professor Sutherland, in "Establishment According to *Engel*," 76 H L Rev 25 (1962), recommended that instead of deciding such constitutional questions as the "Regent's prayer in *Engel*, supra, as one of Establishment, a judicial self-restraint should be exercised, leaving this and similar religious controver-

sies, *not involving oppression or taxation,* to be resolved by other agencies of government or by the citizens themselves. Trenchant observations in this article by Professor Sutherland, (who in his lifetime as a judge's son, a clerk to Justice Holmes, a professor, and writer, stands eminent among Church-State authorities) include:

> "To make inevitable distinctions between a time for judicial action and a time for judicial self-restraint, few sources of guidance can be as satisfactory as the disciplined prepossessions of an independent judge, aware of history, tolerant of the democratic process, and conscious of human limitations." (Page 40.)
>
> "In the absence of substantial oppression of any individual by tax or by regulation, the whole business of state establishment could have been treated as a matter of policy for state legislators, a 'political question' as to how far the wholesome principle of separate church and state, under which government refrains from running churches and churches do not meddle in government, should be pressed to a minimal conclusion in a society as complex as that of today's United States." (Page 41.)
>
> * * * self-restraint by ordinary citizens is a virtue essential to life in a democratic society —a virtue as essential to minorities as to majorities. Unless some person is substantially hurt or oppressed, the judicial systems of the states and of the United States are not often wisely besought to intervene among differing social groups, even when difference is impelled by strong emotional urges." (Page 52.)

Mr. Justice Jackson, concurring in *McCollum v. Board of Education,* 333 U S at 238, put the heart of the matter this way:

> "If with no surer legal guidance we are to take up and decide every variation of this controversy, *raised by persons not subject to penalty or tax,* but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And more importantly, we are likely to make the legal wall of separation between church and state as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." (Emphasis supplied)

IV

THERE IS NO RELIGIOUS ACTIVITY UNDER THIS SECTION OF THE CONSTITUTION.

The Oklahoma Supreme Court, in *McMasters v. State,* 207 P 566, 568 (Okl. Ct. Crim App, 1922), discusses the word religion," citing *Davis v. Beason,* 133 U S 333, and states:

> "It has been held that 'religion' has reference to Divinity; to reverence, worship, obedience, and submission to the mandates and precepts of supernatural or superior beings * * * ."

Petitoners in their Petition show absolutely no well-pleaded religious activity within the words of this Court. In *Anderson v. Laird,* 316 F. Supp. 1081 (D.C. D.C., 1970), involving the attendance of Service Academy members at chapel, the Court states at 316 F Supp 1088:

> "The activities involved are not aimed at the cultivation of religious faith or motivation * * * "

Judge Corcoran further pointed out that cadets are required to attend chapel but not required to participate in the service or to worship. He said, at page 1087:

> "Nor is it revolutionary to say that First Amendment rights are not absolute. * * * Tradition—and the continuous public acceptance of a practice—carries weight and demands recognition. * * * "

Petitioners have completely failed to show that this monument is a shrine or a place of worship or utilized for the propagation of the faith of any specific religious sect. *State ex rel Singelmann v. Morrison,* 57 So. 2d 238, 246 (Ct App La., 1952); *State ex rel Johnson v. Boyd,* 217 Ind. 348, 28 N.E. 2d 256, 265 (1940).

V

MERE DISAGREEMENT IN CONSCIENCE IS NOT A CONSTITUTIONAL INJURY.

Petitioners cannot press down a crown of thorns on every monument to serve their personal thoughts and feelings. In a nation of multiplicity of religious sect, we cannot give every citizen's conscience a right of veto as *he* sees fit. Petitioners are free to hold their convictions of conscience, but they have no right, merely because they are conscientious, to impose them as the law of the land. Mere disagreement in conscience is not a constitutional injury. The Oklahoma Constitution is one of the ten state constitutions which does not even mention "conscience" in the religion proviso.

Utah, however, does. Article I, Section I, *Utah State Constitution..*

Madison's efforts to put a right of conscience in the Bill of Rights failed. Antieu, *Freedom from Federal Establishment,* 128-131 (1964); Note 16 Stan. L. R. 494, 495 (1965), footnote 5.

VI

MONUMENTS REFLECT THE CULTURE AND THE COMMONPLACE OF COMMUNITIES.

Theres are no limits on monuments, and the like, outside of public sentiment or a standard of good taste. Grounded in history and heritage, monuments are part of the community and community life. Recognition is not religion *qua* religion, or religion *per se;* decoration is not indoctrination. *In re Opinion of the Justices,* 9 N.E. 2d 753 (Mass 1937); *Attorney General v. Williams,* 174 Mass. 476, 55 N.E. 77, 78 (1889).

The wisdom of Mr. Justice Jackson in *McCollum v. Board of Education* (1948), is applicable here. At 333 U S 233-237, he observed:

> " * * * it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed always to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress."
>
> " * * * The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity, both Catholic and Protestant and other faiths accepted by a large part of the world's peoples."

> "Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that no matter what practice prevails, there will be many discontented and possibly belligerent minorities."

VII

THE CASES WHICH CREATE FICTITIOUS RELIGIOUS PROBLEMS IN THE LONG RUN MAY DO GRIEVOUS OR MASSIVE DAMAGE TO THE GENERAL IMAGE OF TRUE RELIGION.

The great mischief inherent was wisely noted a hundred years ago in *Queen v. Bishop of London,* 24 W. B. Div 213 (1874):

> " * * * such litigation becomes more mischievous, the longer it is continued, while the results from it are of exceeding little value * * * "

Examples of such litigation have been frequent the last dozen years.[2] Tolerance and toleration, rather than litigation, should be our state and national theme. To paraphrase Madison: we must beware lest the tiny trickle of one unfinished case swell into a raging torrent of absolute secularism. The American Jewish Congress author of "Religion-Blind Government," 15 Stan L R 389 (1963), defines its sweep at page 404:

---

2 See **O'Hair v. Payne,** supra; **Protestants United etc v. O'Brien,** 272 F Supp 712. (U S D C, 1967), **Baer v. Kolmorgen,** 181 NYS 2d 230 (1958), **Lawrence v. Buckmueller,** 243 NYS 2d 87 (1963), **Lewis v. Allen,** 207 NYS 2d 862 (1964), **Brown v. Heller,** 273 NYS 2d 713 (1966).

"Outlawed, too, would be all references to God in oaths of office, state constitutions, presidential resolutions, the pledge of allegiance, the national motto, currency and postage stamps, etc. I have long felt that these were inconsistent with the spirit of the Constitution and the first amendment and with the decisions of the Supreme Court, but I am notoriously 'absolutist' and 'doctrinaire' ".[3]

CONCLUSION

The briefs submitted by the two respondents herein, and by that of the Amicus Curiae, abound with authority to the effect that there is no conflict of decisions herein. Further, that the questions raised by the petitioners are not as important as claimed by them.

The Circuit Court decision, which reversed that of the District Court, is one wherein the decision turns on its own facts, as Judge Murrah so ably set forth in his opinion from the Circuit Court. The outcome will probably affect few others than these petitioner litigants, who ostensibly represent some non-religious sect or group. Hopefully, the authorities cited by the respondents and the Amicus Curiae will convince the court that the decision below was the correct one and that the petition for a Writ of Certiorari should be denied.

Mr. Justice Tobriner expressed the theme (and it could relate to this monument case) all so very well in *People v. Woody*, 394 P 2d 813, 817 (Cal., 1964):

---

3 To which Mr. Justice Jackson's words in **Douglas v. City of Jeanette**, 319 U S 157, 179 (1943) are a fitting reply:
"I do not think it any more intended to leave the conscience of a minority to fix its [society's] limits. Civil government cannot let any group ride rough shod over others simply because their 'consciences' tell them to do so."

"In a mass society, which presses at every point toward conformity, the protection of a self-expression, however, unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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II. The Constitution does not require an absolute separation of church and state and a Writ of Certiorari should not be granted merely because an administrative act of a political subdivision involves something having secondary secular significance. 9

III. The Writ should not be granted because there is no conflict between the circuits concerning whether "purpose and effect" are questions of fact or law. 11

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No. 72-1622

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,

Petitioners,

vs.

SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH,

Respondents.

BRIEF IN OPPOSITION TO PETITIONERS' "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT."

Respondent, Salt Lake City Corporation, Defendant and Appellant in the courts below, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case be denied Petitioners, Alma F. Anderson, et al.

OPINIONS BELOW

The original opinion of Judge Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah was filed September 16, 1972. On October 2, 1972, a substantially revised version of Judge Ritter's opinion was filed and is now reported at 348 F. Supp. 1170. Judge Ritter's original opinion and resion of his original opinion were made after briefs were filed and oral arguments presented to the U.S. Court of Appeals for the Tenth Circuit. The opinion of the Court of Appeals is reported at 475 F.2d 29, and is set forth beginning at Page 1a of the Appendix hereto.

JURISDICTION

Respondent Salt Lake City Corporation accepts Petitioners' jurisdictional statement.

QUESTIONS PRESENTED

I.

1. Whether an admininstrative act of Salt Lake City Corporation, without adopting any ordinance on the part of the Board of City Commissioners, can constitute the enactment of a law which abridges that part of Amendment I of the Constitution which states:

> "Congress shall make no *law* respecting an establishment of religion . . ." (Emphasis Added)

2. Whether the erection on public property of a stone monolith donated by a fraternal organization for the avowed purpose of youth guidance and in recognition of prior law bearing a version of the Ten Command-

ments compiled after consultation with "all religions" and other symbols having solely secular and others having both secular and religious significance, constitutes an establishment of religion.

3. Whether the Court of Appeals improperly overruled the District Court's determination that the purpose and primary effect of Respondent Salt Lake City's allowing the erection of the monolith bearing a version of the Decalogue and symbols having solely secular and others having both secular and religious significance on public property in violation of the First Amendment respecting the establishment of religion.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Respondent Salt Lake City Corporation accepts the statement of Petitioner concerning the constitutional provisions and rule involved.

STATEMENT

This is an action to enjoin Salt Lake City and Salt Lake County from accepting as a gift, and maintaining it on their joint property, a stone monolith bearing one version, not found in any so-called scripture, of the Ten Commandments compiled by the Fraternal Order of Eagles, and also bearing symbols having only secular significance and other symbols having both religious and secular significance.

The monolith was placed on public property, facing west and located three feet east and centered along

the eastern edge of a stone and concrete walkway 44 feet wide and 176 feet long, running north and south, with three benchs evenly spaced along each side, one of which is located in front of the monolith. The walkway leads from the street to the front entrance of the City and County Courts Building. The monolith is maintained and lighted by a single light at public expense. The monolith is approximately three feet wide and five feet high including the base. Persons attending State trials and entering the Courts Building from the north would pass by the monolith on the wide walkway, which is not the only entrance to the building, and are in no way forced to view the monolith and could very readily pass without even seeing the monolith.

The Board of Commissioners of Salt Lake City and Salt Lake County allowed, solely as an administrative function and without formal action, the erection of the monolith on public property by the Fraternal Order of Eagles. The only formal action taken by the City and County was their authorization to erect, on a light standard already in existence, a single spotlight directed toward the monolith which operates at the same time other lights in the area are on.

So far as the content of the inscriptions on the monolith is concerned, the last seven of the Ten Commandments, at least, have been recognized, even by one of the Plaintiffs, as having significance as "at least a precedent legal code," (Transcript P. 32, 33) and the evidence indicated that the inscription on the monolith of a pyramid shaped structure with an eye at the top had significance, both secular and religious, in that among other places it is found as part of the great seal of the United States

and on the dollar bill as well as being recognized as an old religious symbol. The Star of David has been used as a design on clothing and buildings for ornamentation and is also revered by the Jews as a symbol of their religion. The Chi-Rho, the first Greek letters of Christ's name also has significance as the sign of peace. The other symbols on the monolith, such as the symbol for the Fraternal Order of Eagles which is essentially the same symbol as that used by the United States, admittedly have no religious significance.

In reversing the judgment of the District Court, the three Justices of the Court of Appeals re-stated the findings of Judge Willis Ritter; namely, that the message displayed by the monolith was clearly religious in character and that the purpose and primary effect of the monolith was the advancement of religion by the City and County, and then unanimously stated, "we cannot agree" (App. Page 14). They then reversed the judgment in compliance with the requirements of Rule 52 (a), Federal Rules of Civil Procedure.

REASONS FOR REFUSING THE WRIT

I.

THE WRIT SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS DOES NOT EMASCULATE THIS COURT'S PRIOR RULINGS ON STATE ACTIONS INVOLVING RELIGION, IT IMPLEMENTS THEM.

The Court of Appeals extensively examined the Supreme Court's rulings in this area of the law and fairly stated the test in cases of this type.

They also correctly interpreted this body of law at App. 17 when they stated:

> "In applying this test, we must strike a balance between that which is primarily religious and that which is a primarily secular, albeit embodying some religious impact."

The Petitioners seem upset and allege that the Justices of the Court of Appeals found, in Petitioners' words, or allowed situations where "state support of or relation to religion in some degree may be sanctioned, if any reasonable amount of secular purpose can be found in association with an admittedly religious document." (Petitioners' Brief, Page 5.) This, needless to say was not their finding. But in support of what they did find, neither *Everson*, the case most strongly relied on by Petitioners, nor any of the other cases cited in Petitioners' Brief require that everything having any religious significance be proscribed, but rather recognized, as in *Zorach v. Clauson*, 343 U.S. 306, 313, (1952), *Lemon v. Kurtsman*, 403 U.S. 602, 614 (1971) and *Abington School District v. Schemp*, 374 U.S. 203, 294-295 (1963), that many things accepted in our society and which constitute an inseparable part of legal and secular functions have a religious origin, such as In God We Trust on our coins, etc., thus, implementing the prior decisions through a reasonable approach to the problem. The Justices disagreed with Judge Ritter's findings of facts and found the presentation of the Ten Commandments monolith to the City by a non-religious organization was made for the primary purpose of youth guidance, and secondarily as a recognition that the origin of many of the laws governing individuals and institutions under federal, state and local law do have a

basis in laws compiled and instituted earlier albeit having some religious significance. This finding was substantiated by one of the Respondents who recognized the decalogue as at least a precedent legal code, Transcript P. 32, 33, and by the Encyclopaedia Britannica which recognizes the Decalogue as a statement of prior law:

> "The commandments themselves contain little that was new to the ancient world. Prohibition of other gods is parallel to the stipulation of the Hittite treaties that the vassel commits breach of covenants if he enters into a relationship with other kings. The prohibition of images of Yahweh has been found in Palestinian excavations and no certain references to such an image is found in the Old Testament. The vain use of the name of Yahweh is certainly a prohibition of false oaths. This like the rest of the commandments was common morality throughout the ancient near east. Disrespect for parents, murder, theft, adultery, false accusation, were in at least some respects punishable in most legal systems of which we have knowledge. The meaning and purpose of the sabbath at this early date is unknown, though there are possible similarities to the old Babylonian customs. 7 Encyclopaedia Britannica 153 (1968), transcript p. 59.

It states in a later paragraph:

> "The Decalogue was of no particular importance in Christian tradition until A.D. 1246 when it was for the first time incorporated into a manual of instruction for those coming to confession. The traditional division of the commandments into two 'tablets of duties' toward God and men made it possible to regard the second table as a succinct statement of the *'law of nature'* within the framework of medieval christian theology." 7 Encyclopaedia Britannica 153, 154 (1968), Transcript P. 59. (Emphasis Added).

The founding fathers also recognized this same prior law in the Declaration of Independence.

> "... and to assume among the powers of the earth the separate and equal stations to which *The Laws of Nature and of Nature's God* entitle them ..."

Respondents' statement that the Court has never before sanctioned a religious display whose purpose is religious, is correct. In this case, the purpose of the display of the Ten Commandments monolith is neither religious nor for the advancement or inhibition of other religions. The Supreme Court has allowed, by denial of certiorari, other structures to be erected which have a more specific religious Christian connotation and purpose, namely, two crosses. One was allowed in *Paul v. Dade County, Florida,* Fla., Ct. App. 202 S.2d 833, cert. denied, Fla. 207 S.2d 690, cert. denied, 390 U.S. 1041, and the second in *Meyer v. Oklahoma,* 496 P.2d 789 (Okla. 1972) cert. denied, 41 Law Week, 3253.

The Court of Appeals acknowledges that one of the declared purposes of the monolith was to inspire respect for the Law of God, but concluded that this was not the primary purpose or effect of the monolith:

> "We are brought to the conclusion that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief." (App. page 21)

It is the Respondents' contention that this case is not distinguishable from the Paul and Meyers cases, supra. Symbols were displayed for a secular purpose and effect which also had secondary sectarian purpose and

effect but nevertheless were not a violation of the First Amendment.

II.

THE CONSTITUTION DOES NOT REQUIRE AN ABSOLUTE SEPARATION OF CHURCH AND STATE AND A WRIT OF CERTIORARI SHOULD NOT BE GRANTED MERELY BECAUSE AN ADMINISTRATIVE ACT OF A POLITICAL SUBDIVISION INVOLVES SOMETHING HAVING SECONDARY SECULAR SIGNIFICANCE.

Petitioners would have this Court rule that there must be an absolute separation of church and state, and they maintain that in such separation, anything religious should be barred by this court from any kind of support. This position is ridiculously untenable as is verified by Justice William O'Douglas's statement in the majority opinion of the case of *Zorack v. Clauson*, 343 U.S. 306, 313 (1952):

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the mes-

> sages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other *references to the Almighty that run through our laws*, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Courts opens each session: 'God save the United States and this Honorable Court.'" (Emphasis Added) Zorach v. Clauson, (1952) 343 U.S. 306, 96 L. Ed. 954, 72 S.Ct. 679.

This is further buttressed by statements made by Justice Burger in *Lemon v. Kunzman*, supra., at Page 614. See also Griswold, "Absolute is in the Dark," a discussion of the approach of the Supreme Court to constitutional questions, 8 Utah Law Review, 167, 173-176 (1963).

Despite the foregoing, Petitioners would have this Honorable Court wipe out all references to religion in anything connected with this State or its subdivisions. If this were implemented, the agnostic or atheist would be placed in a superior position to those who espouse religion of some sort. At this point who is to say what is or is not religion. Some agnostics and atheists attack religion, or things, as here, they deem religious with as much fervor as any religious zealot. The Constitution does not dictate or require that those denying God be favored over those who avow the existence of God. The Constitution leaves room for as much tolerance by the agnostic and atheist for those who profess religion as it does for those who profess religion of their agnosticism and atheism.

The Ten Commandments, particularly the last seven, have had such an influence on our body of laws

today that even Petitioners do not deny it. It is this influence and not the alleged religious origin of the laws which should be the matter under consideration in this case. The Respondent City asserts that many of our laws today are based on these seven or some similar precedent legal code. The monolith is merly a monument recognizing one of the origins of these laws.

III.

THE WRIT SHOULD NOT BE GRANTED BECAUSE THERE IS NO CONFLICT BETWEEN THE CIRCUITS CONCERNING WHETHER "PURPOSE" AND "EFFECT" ARE QUESTIONS OF FACT OR LAW.

The Court of Appeals did not determine that the questions of "purpose" and "effect" were questions of law rather than fact, they merely disagreed with the conclusions the lower court judge drew from the facts presented, App. 14. There was no need for them to state the words "clearly erroneous" which Petitioners seem to assert are necessary to comply with Rule 52(a), Federal Rules of Civil Procedure. What is the difference when referring to findings of fact if the courts says the findings are "clearly erroneous" or "we cannot agree." Respondent City maintains there is none. There is nothing sacrosanct about the findings of fact of U.S. District Court Judge Willis W. Ritter, that prevents them from being reversed by the Court of Appeals. The only frightening aspect of the case is the consequences of Petitioners seeming assertions, that the findings of fact of a lower court cannot be overturned without using the magic of words.

CONCLUSION

For the foregoing reasons, Respondent Salt Lake City Corporation respectfully prays that the Petition for Writ of Certiorari of Alma F. Anderson, et al, be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OCTOBER TERM 1973

[Caption Omitted]

Before MURRAH, SETH and DOYLE, Circuit Judges. MURRAH, Circuit Judge.

The Board of Commissioners of Salt Lake City and Salt Lake County informally permitted the Fraternal Order of Eagles to erect on city-county courthouse grounds a permanent 3x5-foot granite monolith inscribed with a version of the Ten Commandments and certain other symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet, and Christ or peace. After erection of the monolith in a prominent place near the courthouse entrance, the Commissioners of the City formally authorized the installation and maintenance of lighting equipment to illuminate and enhance the display, at City and County expense. Similar monoliths have been erected in public places across the United States and Canada—nine of them in Utah—as part of the Eagles' established and continuing "youth guidance program," and ". . . to inspire all who pause to view them, with a renewed respect for the law of God, which is our greatest strength against the forces that threaten our way of life."

The plaintiffs, all residents and taxpayers of Salt Lake County, brought this suit seeking removal of the monolith and an injunction prohibiting the City and

County from permitting erection or maintenance of any similar monument on public land, alleging that the presence of the monolith is a violation of the Establishment Clause of the First Amendment, United States Constitution, and Article 1, Section 4, of the Utah Constitution.

Upon trial, the court held that the message conveyed by the monolith was "clearly religious in character"; that by their actions the Boards of Commissioners must be deemed to have adopted the program of the Order of Eagles, with the purpose and primary effect of advancing the cause of religion and certain religious concepts, thus inhibiting the ideas of persons with alternative beliefs, contrary to the prohibitions of the Establishment and Free Exercise Clauses of the First Amendment. Judgment was entered for the plaintiffs. We cannot agree, and, therefore, reverse the judgment.

The City and County challenge the standing of the plaintiffs to bring this suit, alleging lack of a proper nexus between plaintiffs' status and the alleged constitutional infringement, and failure to show any direct injury. But we think the requisite standing is clearly conferred by non-economic religious values when the plaintiffs assert a litigable interest under the Establishment and Free Exercise Clauses of the Federal Constitution. *E.g.*, Allen v. Hickel, 424 F.2d 944, 946 (D.C. Cir. 1970), citing Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970), and Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 616 (2d Cir. 1965). We think the plaintiffs have standing based on their beliefs about religion to question whether those beliefs have been in-

fringed upon by an alleged use of public property for religious purposes.

We do not understand either the City or County to contend that the erection and maintenance of the monolith was not done under color of state law, in the constitutional sense in which the question is presented here for decision. *Cf.* Lowe v. City of Eugene, 254 Ore. 518, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042 (1970); Allen v. Hickel, *supra* at 947; and Everson v. Board of Education, 330 U.S. 1, 15-16 (1947). The City and County do invoke the abstention doctrine, contending that the federal court should have stayed its hand while the matter in issue is litigated in the state courts under the similar clauses of the state and federal constitutions. But this is not a case or circumstance calling for abstention of the exercise of federal jurisdiction. The right asserted here is a basic First Amendment right, of which the federal court has jurisdiction, and, although a like provision of the state constitution is involved, proper resolution of the federal right is not conditioned upon resolution of any state question, law, or constitution. *See, e.g.*, Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971); Zwickler v. Koota, 389 U.S. 241, 248 (1967), quoting Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D.C. Kan. 1945); and Monroe v. Pape, 365 U.S. 167 (1961).

This brings us to the point of applying the Establishment Clause to the facts in this case. Surely nothing we can say at this time or place concerning the scope and effect of the Establishment Clause can serve to add to what has already been so prolifically said elsewhere. From Everson v. Board of Education, *supra*, to Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court

has treated the Establishment and Free Exercise Clauses under various factual situations with perplexing diversity of views.[1] But throughout all these scholarly and authoritative writings runs a strain of consistency—one clear and distinct tenet of which we can be sure—the Constitution mandates complete government neutrality in religious matters. See, *e.g.*, Everson v. Board of Education, *supra*; and Abington School Dist. v. Schemp, 374 U.S. 203 (1963).

The government may not ". . . pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ." Everson v. Board of Education, *supra* at 15. Nor can one cent of taxpayers' money be devoted to religious purposes. *E.g.*, Douglas, J., concurrence, Lemon v. Kurtzman, *supra* at 640, and Everson v. Board of Education, *supra* at 16.

In Lemon v. Kurtzman, *supra*, Chief Justice Burger reviewed and summarized the case history of the Establishment Clause. Said he, "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. . . . Judicial caveats against entanglement must recognize that the line of separation,

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[1]For example: In Everson v. Board of Education, 330 U.S. 1 (1947), Jackson and Rutledge, JJ., filed separate dissenting opinions; in Zorach v. Clauson, 343 U.S. 306 (1952), Black, Frankfurter and Jackson, JJ., each filed a separate dissenting opinion; in McGowan v. Maryland, 366 U.S. 420 (1961), Harlan, J., joined Frankfurter, J., in an 83-page dissenting opinion with two appendices; in Abington School Dist. v. Schemp, 374 U.S. 203 (1963), Douglas, Brennan and Goldberg, JJ., each concurred separately, while Steward, J., dissented; in Walz v. Tax Commission, 397 U.S. 664 (1970), Brennan, J., concurred specially, Harlan, J., wrote a separate opinion, and Douglas, J., dissented; and, in Lemon v. Kurtzman, 403 U.S .602 (1971), Black, J., joined Douglas, J., in a special concurrence, while Brennan and White, JJ., wrote separate opinions.

far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S., at 614. Writing in the same case, Mr. Justice Brennan delineated pertinent standards in these words, "[w]hat the framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." 493 U.S., at 643, quoting Abington School Dist. v. Schemp, *supra* at 294-295 (concurring opinion), and Walz v. Tax Commission, 397 U.S. 664, 680-681 (1970) (concurring opinion). From all that has been said, "[t]he test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution." *E.g.*, Abington School Dist. v. Schemp, *supra* at 222.

In applying this test, we must strike a balance between that which is primarily religious and that which is primarily secular, albeit embodying some religious impact. A tempered approach obviates the absurdity of striking down insubstantial and widely accepted references to the Diety in circumstances such as courtroom ceremony, oaths of public office, and on national currency and coin. *E.g.*, Allen v. Hickel, *supra* at 949. Overzealous rigidity may diminish or ultimately destroy the bulwark we have erected against governmental in-

terference in matters of religion. Walz v. Tax Commission, *supra* at 669. We know that "[t]he government may depict objects with a spiritual content, but is may not promote or give its stamp of approval to such spiritual content." Allen v. Hickel, *supra* at 948.

The decisions involving factual relationships more closely bearing upon our own case suffer from a lack of unanimity of reasoning and results. A brief reference to those cases serves to bring our case into constitutional focus. A string of lights in the form of a Latin Cross on the side of a courthouse was not a violation of the Establishment Clause because its primary purpose was found to be seasonal decoration of the downtown area for the benefit of business. *See* Paul v. Dade County, 202 So.2d 833 (Fla. App. 1967), *cert. denied*, 207 So. 2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968). In Allen v. Hickel, *supra*, the plaintiffs objected to the annual erection of a creche on federal land, as part of a continuing seasonal pageant initiated in 1954. The trail court granted defendants' motion for summary judgment on grounds that the creche was only one of a group of symbols intended to represent the way Americans celebrate a particular holiday season. The Court of Appeals reasoned that the absence of evidence precluded determination of the "purpose and primary effect" of the creche, and accordingly remanded the case. Plaques were subsequently installed at the display explaining the secular purpose and history of the pageant. On remand the trial court recognized the religious significance of a nativity scene, but, in view of the additional secular significance of the creche in the over-all circumstances of the pageant, held that the religious effect was not sub-

stantial, hence the creche was not proscribed. *See* Allen v. Morton, 333 F.Supp. 1088 (D.C. 1971).

In another case involving issues similar to those we face here, Lowe v. City of Eugene, *supra*, the city issued permits for erection of a permanent cross in a municipal park. Despite contentions by the city that the cross was to be a war memorial and an attraction for local business, and that the erection did not involve public expense, the court ordered removal of the monument on grounds that the cross represented preferential treatment of particular religious ideas by the municipality. In another case, an Oklahoma City resident and taxpayer brought a suit seeking an injunction to prevent the city or its officials from maintaining a 50-foot-high Latin Cross at the municipal fairgrounds. The Supreme Court of Oklahoma, affirming unanimously the sustaining of defendant's general demurrer on grounds that the cross was displayed in a "secular environment" and displayed sectarian ideas only in a "most evanescent" manner, emphasized that the action was brought only under the Oklahoma Constitution, and did not involve a question of federal relief. Meyer v. Oklahoma City, 496 P.2d 789 (Okla. 1972), *cert. denied*, 41 L.W. 3253.

It is against this background that we determine the "purpose and primary effect" of the subject monolith. The exact origin of the Ten Commandments is uncertain,[2] but testimony in the record aids the supposition that a large portion of our population believes they are Bible based. Even so, an ecclesiastical background does not necessarily mean that the Decalogue is primarily re-

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[2]See, e.g., J. Stamm and M. Andrew, The Ten Commandments In Recent Research 22-28, et seq. (2 ed. 1962).

ligious in character—it also has substantial secular attributes. Indeed, one of the plaintiffs in our case, a lawyer, admitted while testifying that, ". . . the Ten Commandments is an affirmation of at least a precedent legal code."

Although one of the declared purposes of the monolith was to inspire respect for the law of God, yet at the same time secular purposes were also emphasized. It is noteworthy that the Order of the Eagles is not a religious organization—it is a fraternal order which advocates ecclesiastical law as the temporal foundation on which all law is based, but this creed does not include any element of coercion concerning these beliefs, unless one considers it coercive to look upon the Ten Commandments. (Although they are in plain view, no one is required to read or recite them. *Cf., e.g.*, Cohen v. State of California, 403 U.S. 15 (1971).)

So the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . .].'" Abington School Dist. v. Schemp, *supra* at 213, quoting Memorial and Remonstrance Against Religious Assessments, as cited in Everson v. Board of Education, *supra* at 71-72 (Appendix to dissenting opinion). "The history of man is inseparable

from the history of religion." *See* Engel v. Vitale, 370 U.S. 421, 434 (1962).

It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era. *See e.g.*, Griswold, Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah Law Rev. 167, 173-176 (1963). The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses does not dictate obliteration of all our religious traditions. *See, e.g.*, Griswold, *supra*. Although an accompanying plaque explaining the secular significance of the Ten Commandments would be appropriate in a constitutional sense, we cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects.

No one can be the judge of his own objectivity. It may well be that in this blurred, indistinct area of our national life and environment, opinions about the purpose and effect of the monolith are influenced by orthodox or unorthodox propensities. But be that as it may, we are brought to the conclusion that the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief.

The judgment of the District Court is, accordingly, reversed.